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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 693

JOHN VANCE TAYLOR, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 11, 1932

CERTIORARI GRANTED MARCH 28, 1932

(36,507)

(36,507)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 29, 1932

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[fols. a & 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

vs.

JOHN VANCE TAYLOR, Otherwise Known as JOHN V. TAYLOR

INDICTMENT—Filed December 23, 1930

The Grand Inquest of the United States of America, in and for the District of Maryland, inquiring for the body of said District, do on their oath present that John Vance Taylor otherwise known as John V. Taylor, late of said [fol. 2] District heretofore, to wit, on the 20th day of November, in the year of our Lord nineteen hundred and thirty, at Curtis Bay, Baltimore, in the State of Maryland and District aforesaid, did unlawfully have in his possession certain intoxicating liquor to wit, 122 cases of whiskey (732 gallons) a more particular description of said intoxicating liquor being to the Grand Inquest aforesaid unknown, the possession of said intoxicating liquor as aforesaid being then and there prohibited and unlawful; contrary to the form of the Statute in such case made and provided, and against the peace, government, and dignity of the United States.

Act October 28, 1919, Title 2, Sections 3 and 29.

And the Grand Inquest aforesaid, upon their oath aforesaid, do further present that heretofore, to wit, on the 14th day of December, in the year of our Lord nineteen hundred and twenty-three, a Criminal Information was filed in the District Court of the United States for the District of Maryland, at Baltimore, charging the said John V. Taylor with the unlawful and prohibited manufacture and possession of intoxicating liquor and possession of property designed for the manufacture of liquor in violation of the Act of October 28, 1919, known as the National Prohibition Act, which said manufacture and possession of intoxicating

liquor and possession of property as aforesaid was then and there prohibited, and unlawful.

That on the 5th day of March, in the year of our Lord nineteen hundred and twenty-four, in said Court, the said John V. Taylor upon a plea of not guilty and subsequent conviction by a jury duly empanneled and sworn, was by the Court sentenced to 5 months in jail, all of which will more fully and at large appear by reference to the Record of Criminal Proceedings, Number 5467, instituted at the December Term, 1923, of said Court, all of which was and is unlawful and prohibited, and contrary to the form of the Statute in such case made and provided, and against the peace, government and dignity of the United States.

Act October 28, 1919, Title 2, Sections 3 & 25.

[fol. 3] And the Grand Inquest aforesaid, upon their oath aforesaid, do further present that heretofore, to wit, on the 27th day of June, in the year of our Lord nineteen hundred and twenty-eight, a Criminal Information was filed in the District Court of the United States for the District of Maryland, at Baltimore, charging the said John Vance Taylor with the unlawful and prohibited possession and transportation of intoxicating liquor in violation of the Act of October 28, 1919, known as the National Prohibition Act, which said possession and transportation of intoxicating liquor as aforesaid was then and there prohibited and unlawful.

That on the 29th day of June, in the year of our Lord nineteen hundred and twenty-eight, in said Court, the said John Vance Taylor entered a plea of guilty and was sentenced to pay a fine of $200.00 and costs, all of which will more fully and at large appear by reference to the Record of Criminal Proceedings, Number 11696, instituted at the June Term, 1928, of said Court, all of which was and is unlawful and prohibited and contrary to the form of the Statute in such case made and provided, and against the peace, government, and dignity of the United States.

Act October 28, 1919, Title 2, Section 3.

James M. Hoffa, Assistant U. S. Attorney.

The foregoing Indictment endorsed as follows:

"A True Bill.

J. Barry Mahool, Foreman."

[fol. 4] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

vs.

JOHN VANCE TAYLOR

MOTION TO SUPPRESS EVIDENCE AND QUASH INDICTMENT AND ORDER OF COURT OVERRULING SAME—Filed February 19, 1931

To the Honorable the judge of said court:

The Petition of John Vance Taylor, Defendant in the above entitled case, respectfully represents:

1. That your petitioner is a resident of 5100 Curtis Avenue, Baltimore, Maryland, where your petitioner resides with his family.

2. That on or about November 20th, 1930, about 3 o'clock A. M., Prohibition Agents, Ernest Ford, Robert Ford, John Barton and H. Brink proceeded to the residence of said Defendant and searched said resident premises and garage which adjoins the premises, without any violation taking place in their presence.

3. That the said Agents did not have a search warrant necessary to search said property, but proceeded to search and did search without any probable cause and then and there seized a quantity of intoxicating liquor.

4. That the search and seizure without a lawful warrant was improper.

[fol. 5] 5. That by virtue of the evidence as obtained aforesaid, an indictment was issued by the United States Grand Jury, at the instance of the United States District Attorney's Office of this Honorable Court, charging your Petitioner with possession, which indictment is now pending against him in this Honorable Court.

6. That your Petitioner anticipates that the intoxicating liquors seized by said Agents will be used as evidence against him at the trial of the above entitled case.

7. That your Petitioner alleged that the intoxicating liquors seized as aforesaid was in violation of your Petitioner's rights under the 4th and 5th Amendments of the Constitution of the United States and contrary to the provisions of Section 25, Title II of the National Prohibition Act, an Act of Congress approved October 20th, 1919, and in direct violation of Section 6, etc., of the Act Supplemental to the National Prohibition Act, an Act of Congress approved November 23rd, 1921, in that the said search, seizure and arrest were not in accordance with the process of law.

Wherefore your Petitioner moves that the evidence obtained as aforesaid be excluded at the trial of the above entitled case in this Honorable Court and that the said evidence be suppressed and that this Honorable Court order the indictment quashed.

Samuel S. Levin, Attorney for Defendant. John Vance Taylor, Defendant.

Duly sworn to by John V. Taylor. Jurat omitted in printing.

[fol. 6] Order of Court

Motion to Suppress Evidence and to quash the indictment "Overruled".

William C. Coleman, United States District Judge.

11-19-31.

In United States District Court

Plea

And thereupon, the said John Vance Taylor, came to the bar of the Court here in his proper person, and having hearing of said Indictment, and forthwith being demanded of him concerning the premises in the said Indictment above specified and charged upon him how he will acquit himself thereof, the said John Vance Taylor, does say that he is Not Guilty thereof, and thereof for good and evil he does put himself upon the country, and the said James M. Hoffa,

Esq., Assistant United States Attorney for the District aforesaid, who in this behalf prosecuteth doth the like.

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

AGREEMENT OF PARTIES WAIVING TRIAL BY JURY—Filed February 19, 1931

It is hereby stipulated and agreed between counsel for the United States, the traverser and counsel for the traverser that this case be tried by the Court only, without a jury and that a jury trial be and the same is hereby expressly waived.

James M. Hoffa, Asst. United States Attorney. John Vance Taylor, Traverser. Samuel S. Levin, R. Palmer Ingram, Attorneys for Traverser.

IN UNITED STATES DISTRICT COURT

VERDICT

And, thereupon, the Court sitting as a Jury, doth say that the said John Vance Taylor is guilty of the premises aforesaid and laid to his charge in the manner and form as by the said Indictment is charged upon him.

IN UNITED STATES DISTRICT COURT

JUDGMENT

Therefore, it is considered by the Court here that the said John Vance Taylor be imprisoned for three months in Jail and pay a fine of Seven Hundred and Fifty Dollars and costs.

Memorandum

Verdict was rendered in this case on the 12th day of February, 1931, and Judgment was rendered on the same day.

[fol. 8] Memorandum.

The said John Vance Taylor was thereupon, to wit, on the 19th day of February, 1931, admitted to bail in the sum of $2000 to abide the judgment of the United States Circuit Court of Appeals for the Fourth Circuit and of this Court.

In United States District Court for the District of Maryland

No. 14374, Criminal Docket

United States of America

vs.

John Vance Taylor

Order Extending Time for Filing Bill of Exceptions to 18th April, 1931—Filed March 19, 1931

For good cause shown, it is this 19th day of March, 1931, ordered, that the time for the filing of the Bill of Exceptions, in the above entitled case, be and the same is hereby extended for a period of thirty days from date hereof.

William C. Coleman, United States District Judge.

At Baltimore, Maryland, this 19th day of March, 1931.

[fol. 9] In United States District Court for the District of Maryland

No. 14374, Criminal Docket

United States of America

vs.

John Vance Taylor

Order Extending Time for Filing Bill of Exceptions to 17th May, 1931—Filed April 17, 1931

For good cause shown, it is this 17th day of April, 1931, ordered, that the time for the filing of the Bill of Excep-

tions, in the above entitled case, be and the same is hereby extended for a period of thirty days from date hereof.

William C. Coleman, United States District Judge.

At Baltimore, Maryland, this 17th day of April, 1931.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed May 18, 1931

(Style of court and title omitted)

CAPTION

A condensed and narrative form of the evidence offered by the Government in the above styled case, save as a proper understanding of the questions presented may require that it be set forth otherwise.

Be it remembered:

ERNEST J. FORD testified as follows: He was no longer a federal Prohibition agent, but had been an agent for about four years. In the course of his duties as a federal officer [fol. 10] he went to the premises, 5100 Curtis Avenue, Curtis Bay, Baltimore, Maryland, on November 20, 1930, as the result of a number of complaints, regarding "a place on Curtis Avenue that was being used to store whisky." Ford, in company with other agents, had been "on the road during the night of the 19th and after midnight we decided on our way back to Baltimore to investigate the garage at Curtis Bay at 5100 Curtis Avenue." The witness went to the front double door of the garage, where, he said there was a strong odor of whisky. The garage was on a small nine foot alley which ran between it and a police station. The agents looked for a door on the alley side of the garage and found a small door but it had been closed. The witness was not sure, but believed the garage was constructed of metal. It was only large enough for one automobile. It was not possible to drive a car into the garage from the alley. The doors were on the side facing Curtis Avenue. There was a yard on the other side of the garage, and the witness thought there was a vacant lot in the rear of it.

The agents first arrived at the premises around 2:30 o'clock in the morning. Besides the witness, there were Agents Ford, Barton, Brink and several other agents. The witness stated there had been complaints about this place for about a year. A motion by the defendant to strike out this statement was overruled. These complaints had not been followed up because the agents thought the place was too close to the police station to permit of any truth in the complaints, which caused the agents to be skeptical thereof. About two days previous to the raid, they had a complaint about it. The witness and Agent Barton were the first to approach the garage. They walked up to the front of it. The odor of whisky was around it and there was a crack of about an inch and a half or two inches under the bottom of the door. Agent Barton held a flash light to the crack of the door while the witness looked through a small crack between the two doors and could see cases piled up in the garage. These cases were ordinary mason jar cases and the witness added, "what you usually put whisky in." Over the objection of the defendant, the witness was allowed to testify that they were the kind of cases that they usually use around a still to put whisky in, according to his experience as an agent. The cases were made of cardboard [fol. 11] and each held a dozen half-gallon jars. After discovering that the garage had a large number of cases in it and no automobile, they decided "to in some way enter the garage." They found that the front doors of the garage were fastened from the inside and then they made a further investigation to find out how the people who had fastened the door on the inside left the garage, and they discovered a small door that "led out of the garage to the home of Mr. Taylor, into the yard of the home where he lives." There was a board fence there and the only way to reach that door was to climb over the fence. They entered the garage from the yard through this door. In the garage they found 122 cases of whisky. The witness was the first one to enter the garage. He had been inside the garage about two minutes when two other agents came into the garage bringing Mr. Taylor, whom they had arrested. Taylor was turned over to the witness who questioned him. At first Taylor said the garage did not belong to him and later admitted that it did belong to him. He said he didn't know anything about the whisky, that the garage was his,

but the whisky was not his. Later he admitted that the whisky was his. The witness said that he knew that Taylor had been convicted for another liquor violation. Concerning the complaints about the place, the witness said he could not remember whether names were mentioned in all of them, but that in the last complaint they got he remembered well that Mr. Taylor's name was mentioned. After Taylor's arrest, he was searched and a key found in his pocket which fit the lock of the garage door. When the witness first detected the odor he was "right in front of the double doors that faced on Curtis Avenue." He said he knew the odor of whisky from his four years experience as a prohibition agent.

Cross-examination:

Pm cross-examination the witness said he later went into the house with the defendant. He went through the kitchen and dining room and in the front part of the premises was a saloon which defendant said had not been used since Prohibition. Witness didn't remember that Taylor offered to take him through it, but he did say it had not been used for a number of years. Asked whether he was satisfied with the defendant's statement, that the [fol. 12] saloon part of the premises had not been used since Prohibition, the witness answered he didn't have any business searching the place. The agents had no search warrant for the garage. The witness had at no time gone to the United States Commissioner for a search warrant to search the garage, in spite of the fact that they had had complaints about it over a period of about a year. None of these facts were ever taken before the Commissioner or application for a search warrant made to him. The case was dismissed by the United States Commissioner when it came up for hearing. The front of the garage faced Curtis Avenue, one side was on the alley and the other sides were inside a fence which enclosed the premises. The witness did not know whether or not the United States Industrial Alcohol plant was within a block of the premises. He knew there was such a plant in Curtis Bay.

Q. You could not, of course, tell what was in those cases, could you?

A. Well, I could not say what was in them.

Q. Of course not. And you did not know what was in them, did you?

A. Well, I might say that I didn't know and I might say that I did.

Q. You suspicioned, but you did not know, did you?

A. I had a strong suspicion.

Q. But you did not know what was in them because you never had seen inside them, had you?

A. That is right.

The witness jumped over the fence into the yard in order to enter the garage, because he didn't want to break down the double doors in front. After jumping over the fence and entering the yard, he entered by breaking the hasp off the door leading from the yard into the garage. Asked whether they broke the hasp off, witness answered that they didn't break it off, they pulled it off. He had not seen Taylor before he went into the garage.

Motion to Strike

At the conclusion of the testimony of this witness, a motion to strike out all of his evidence was made by the defendant. The Court overruled the motion and an exception was noted.

[fol. 13] John M. Barton testified as follows: He was a federal prohibition agent and had been in the service since 1922. After arriving at the premises he looked under the double doors of this garage and saw a portion of the cases inside. Ford was the first man who got in, and after the agents were there for possibly ten minutes or so, Taylor appeared on the sidewalk. He looked as though he had just been aroused from sleep. It was not quite clear to the witness whether he first saw the cases from under the door or whether the doors were "kind of pulled apart."

"I am speaking of the first time I saw the cases," the witness said. "I am not just clear as to whether it was under the door or through the crack in the two doors that would be left by forcing them apart."

Q. Was there any odor around the premises?

A. Well, as to the odor of whisky, I cannot say that I detected it.

Someone of the agents had a flashlight that was used in order to see into the garage.

From his experience as a prohibition agent, witness stated that the cases seen by him in the garage were the same kind as used by the larger liquor operators.

Cross-examination:

On cross-examination the witness admitted that the front doors were forced apart but that the agents failed to gain entrance through that way.

There was a dog in the yard that made a commotion. The first time he saw Taylor was when he appeared on the street near the garage after the entry had been made. There was an alcohol plant in Curtis Bay but he had never been to the plant himself. He had been an agent for about nine years. He repeated that, "I won't commit myself about the odor of whisky about the garage."

[fol. 14] HOBART D. BRINK testified as follows: He had served as a Prohibition agent and investigator since 1924 with exception of about six months. He was now in charge of enforcement work in Baltimore. He accompanied the other agents to 5100 Curtis Avenue on November 20th. When they arrived at the garage, Agents Ford and Barton were the first to approach it in making this investigation. One of them had a flash light. Shortly after they approached the garage he got out of the automobile, walked up to the garage, lay down on the sidewalk and looked through the crack under the doors. He could see the cases inside. These cases were cartons containing two-quart Mason Jars which they had found were used in most instances to transport and store whisky. The cartons were made of corrugated card board. There were a number of these cases which you could see under the door and by looking in through the crack between the doors. There was a hasp on the door that you could take hold of and pull out to make a crack between the doors which you could look through at the top, and when the light was thrown under the doors you could see the cases inside. There was an odor of corn whisky about the place. It was a sort of sour smell. After they got into the garage they found that some

of these cartons had evidently been used before as they were broken and soaked with liquor. The witness first got the odor when he was lying on the ground looking through the crack under the door. The agents were around the place for some time before Ford climbed over the fence and went inside. The witness first observed the odor of whisky while lying down on the sidewalk in front of the garage looking through a crack under the door, before Mr. Ford had gone over the fence.

"By the Court:

"Q. When did you first get the odor?

"A. When I was lying—I think I noticed it first when I was examining the door through the crack, lying on the ground looking under the crack in the door.

"By Mr. Hoffa:

"Q. Up to that time had there been any attempt made to enter the garage?

"A. No sir. We were around there for some time until [fol. 15] Mr. Ford went over the fence, went in the side—I was not present when he went in, I went in later, went through after the back door was opened.

"Q. Now, Mr. Brink, you say you got down on the ground, and you attempted to open the doors; you tried to open them from the outside, is that right?

"A. No, sir, I never did attempt to open the doors.

"Q. Was someone trying to open them while you were down on the ground?

"A. No, sir, there was some one looking through there to see inside the garage. The only attempt that was made to get in the garage, the first attempt made to get in it, to my knowledge, and I was there all the time, was when Agent Ernie Ford went over the fence."

Cross-examination:

On cross-examination the witness admitted that there had been complaints about these premises, that he was the agent in charge, but that he had never been to the United States Commissioner to attempt to obtain a search warrant for these premises. He turned the information over to Agent Ford, but had not directed him to go to the United

States Commissioner to get a warrant. He never made any effort himself to see that a warrant was obtained for these premises. The premises was enclosed by a fence and the two sides of the garage which extended to the street and alley. The fence ran back quite some distance to the garage and connected with it. Taylor had to go into the house after his coat and Agent Ford went in with him. Taylor was evidently living there. The witness did not see in the cartons, but said he was convinced what was in them.

He did not know how long the whisky had been there or whether it was there before prohibition, but was convinced from the odor that whisky had been there for a long time. There was an unmistakable odor of corn whisky about the premises. He did not see anybody in the yard or around the house before Ford entered the garage. The first he saw of Taylor was when Robert Ford was talking to him on the sidewalk. He did not see him come from the house. Agent Ford had gone over the fence before he saw Taylor. The agent said he had no information that the saloon was [fol. 16] in use. It was not searched. He was not familiar with that section and did not know that there was a plant of the United States Industrial Alcohol Company in the vicinity. The witness never made any application for a warrant to search the premises.

Testimony of witness concluded.

By agreement it was admitted that the chemist's report showed that samples submitted in the case was corn liquor, water white, containing alcohol by volume 41.05 per cent.

The Government admitted that the premises is a private dwelling occupied as such by the defendant.

Court records of two prior convictions were admitted by agreement.

The Government's case was then closed.

MOTION RENEWED

A Motion was made by the defendant to exclude all the evidence on the ground that the search was without a search warrant and that it was the search of a private

dwelling in violation of Section 6 of the Willis-Campbell Acts.

The Motion was overruled by the Court and an exception was noted.

The defendant offered no evidence.

OPINION OF THE COURT

The COURT (COLEMAN, J.), orally:

The Court has reached the conclusion that this motion must be overruled, for the following reasons: Of course, in a number of these cases the line of distinction is narrow and each case has to be treated on its own particular facts. It is equally true that the constitutional protection that sur- [fol. 17] rounds the private home must be very carefully safeguarded, but that rule must be applied in a common sense way. It is also true in this case that we are not concerned with what the evidence proves beyond a reasonable doubt, but merely with what the weight of the evidence discloses.

The case is not, at this stage, the trial of a defendant as to his guilt or innocence of a given charge, but is merely a hearing on a motion to determine whether or not certain evidence can or can not be used against him. On the evidence taken as a whole the Court is forced to the conclusion that the agents were able to, and did definitely detect the odor of whiskey before they entered the premises or laid hands on any part of the premises. It is true there is the testimony of one of the three agents that he can not say whether or not he detected the odor of whisky, but there is no evidence by any one absolutely negativing the odor of whisky from the sidewalks. Therefore, on that point the Court feels constrained to conclude that the weight of the evidence, the weight of the credible evidence has not been contradicted. The weight of the credible evidence leads necessarily to the conclusion that from the outside, without having entered the premises, these agents did detect the odor.

Then comes the second point—may one with such sense of smell enter premises of this kind? It is unnecessary to dilate on the general principles announced a number of

times by this Court that a search warrant even for private dwellings, is not indispensible. It is indispensible unless the officer enters the premises in the course of the detection of some crime, and for the purpose of attempting to arrest the person engaged in the commission of such crime. The officer must have reasonable ground to believe that the crime is there being committed; he does not need to see the person in the commission of it; he does not need to hear the person in the commission of it, but he must either see, or hear, or smell something which gives him reasonable basis for believing that a crime is being committed on the premises. What is reasonable is a question of fact in each given case.

Here we may assume that this garage should be treated [fol. 18] as a part of the private dwelling, although it is not entirely clear from the facts that it actually was, but assuming that it was, and accepting the evidence as I must, that the odor was very definite from the outside, the agents then proceeded, following their sense of smell, to determine what was there. Now, a strong smell of whisky coming from a garage certainly reasonably indicates to an officer that whisky is being stored there. And it is not an unreasonable deduction from that first conclusion that that whisky is improperly there—certainly it is very much more reasonable to assume that it could not, than that it could be there legally. There is also evidence that before the premises were entered the agents actually saw evidence of a large number of cases stored in this small garage. The court has no hesitancy in saying that the whole weight of the evidence shows that these officers had reasonable grounds for believing that storage of whisky was taking place on these premises, and unless the whisky was possessed under very peculiar circumstances, which it would not be reasonable to assume existed as to these premises, the possession would be unlawful and the officers were, in the opinion of the Court, justified in following their sense of smell and entering the premises.

It may have been more orderly to have proceeded to obtain a search warrant. The officers may have been able to get at one time or another, and perhaps on previous occasions, evidence which would have supported the issuance of a search warrant, but the Court fails to find that, in spite of that fact, the agents under the circumstances exceeded

their authority. They acted, as the Court views the evidence, not merely upon suspicion, but upon one of their senses, in the face of conditions which no reasonable man could assume represented legitimate storage of whisky. The place, the time, the quantity, all the elements must have indicated to a reasonable man that something unlawful was going on.

Some suggestion has been made that the crime to be detected must be a felony, or that the person must be there who is going to be arrested. The Court does not so construe the requirements of the law generally. Possession of liquor is a crime under the National Prohibition Act, as [fol. 19] well as transportation, manufacture and sale. That being true, I see no reason for distinguishing, under circumstances such as those in the present case, between the right of an agent to enter such premises, and his right to enter if some other criminal act unrelated to liquor were being done on the premises.

The motion is overruled.

ORDER SETTLING BILL OF EXCEPTIONS

To which action and ruling of the Court in so refusing the said defendant's request as aforesaid, the defendant then and there excepted, and prays the Court to sign and seal this his Bill of Exceptions, which is accordingly done this 18th day of May, 1931.

William C. Coleman, United States District Judge for the District of Maryland. (Seal.)

5/18/31.

This Bill of Exceptions is agreed upon.

Simon E. Sobeloff, U. S. Attorney. James M. Hoffa, Assistant U. S. Attorney.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS— Filed February 19, 1931

(Style of court and title omitted)

Now comes the Appellant, John Vance Taylor, and assigns Errors in the rulings and the judgment of the Court in the above styled cause:

(1) The Court erred in permitting the Government to introduce any evidence relating to the search and seizure.

[fol. 20] (2) The Court erred in permitting the Government to introduce the testimony of Agent Ernest J. Ford relating to the search and seizure.

(3) The Court erred in permitting the Government to introduce the testimony of Agent John M. Barton relating to the search and seizure.

(4) The Court erred in permitting the Government to introduce the testimony of Agent H. D. Brink relating to the search and seizure.

(5) The Court erred in overruling the defendant's Motion to suppress the evidence relating to the search and seizure.

(6) The Court erred in sentencing the defendant as if for a conviction of a third offense of possession of intoxicating liquors, whereas in fact the Court should have sentenced the defendant as a second offender as to unlawful possession of intoxicating liquors, and this fact was called to the attention of the Court before the imposition of said sentence herein complained of.

(7) The Court erred in refusing the defendant's motion to exclude all of the testimony and direct a verdict for the defendant.

Samuel S. Levin, R. Palmer Ingram, Attorneys for Petitioner.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

versus

BENJAMIN FRANKLIN CLATTERBUCK, ROBERT A. CLATTERBUCK, JOHN V. TAYLOR, JOHN ARTHUR CARTER, and EDDIE BROWN

CRIMINAL INFORMATION IN CASE No. 5467—Filed December 14, 1923

[fol. 21] A. W. W. Woodcock, Attorney for the United States of America, in and for the District of Maryland, who for the said United States in this behalf prosecutes,

in his own proper person, comes into Court this 14th day of December, 1923, and gives the Court here to understand and be informed that Benjamin Franklin Clatterbuck, Robert A. Clatterbuck, John V. Taylor, John Arthur Carter and Eddie Brown, each late of said District, heretofore, to wit, on the seventeenth day of November, in the year of our Lord, nineteen hundred and twenty-three at Prince Georges County, in the State of Maryland and District aforesaid, did unlawfully manufacture certain intoxicating liquor, to wit, 296 gallons of whiskey, and 12,800 gallons of mash, a more particular description of said intoxicating liquor is to the United States Attorney aforesaid unknown, the manufacture of said intoxicating liquor as aforesaid being then and there prohibited and unlawful; contrary to the form of the Statute in such case made and provided, and against the peace, government and dignity of the United States.

Act October 28, 1919, title 2, section 3.

Second Count

And the said Attorney further gives the Court here to understand and be informed that Benjamin Franklin Clatterbuck, Robert A. Clatterbuck, John V. Taylor, John Arthur Carter and Eddie Brown, each late of said District, heretofore, to wit on the seventeenth day of November, in the year of our Lord, nineteen hundred and twenty-three, at Prince Georges County in the State of Maryland and District aforesaid, did unlawfully have in their possession certain intoxicating liquor, to wit, 296 gallons of whiskey and 12,800 gallons of mash a more particular description of said intoxicating liquor is to the United States Attorney aforesaid unknown, the possession of said intoxicating liquor as aforesaid being then and there prohibited and unlawful; contrary to the form of the Statute in such case made and provided, and against the peace, government and dignity of the United States.

Act October 28, 1919, title 2, section 3.

[fol. 22] Third Count

And the said Attorney further gives the Court here to understand and be informed that Benjamin Franklin Clatterbuck, Robert A. Clatterbuck, John V. Taylor, John

Arthur Carter and Eddie Brown, each late of said District, heretofore, to wit, on the seventeenth day of November, in the year of our Lord, nineteen hundred and twenty-three, at Prince Georges County, in the State of Maryland and District aforesaid, did unlawfully have in their possession certain property designed for the manufacture of liquor intended for use in violating the provisions of Title 2 of the Act of October 28, 1919, to wit; One 1000 gallon still, one 500 gallon still, and one 1500 pound steam pressure boiler, a more particular description of which said property designed for the manufacture of liquor intended for use in violating the provisions of Title 2 of the Act of October 28, 1919, is to the United States Attorney aforesaid unknown; the possession of which said property designed for the manufacture of liquor intended for use in violating the provisions of Title 2 of the Act of October 28, 1919, as aforesaid, being then and there prohibited and unlawful; contrary to the form of the Statute in such case made and provided, and against the peace, government and dignity of the United States.

Act October 28, 1919, title 2, section 25.

Wherefore the said Attorney in behalf of the United States prays the consideration of the Court here in the premises and that due process of law may be awarded against the above named defendants in this behalf to make answer to the United States touching and concerning the premises aforesaid.

A. W. W. Woodcock, United States Attorney.

[fol. 23] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

No. 5467, Criminal

UNITED STATES OF AMERICA

vs.

BENJAMIN FRANKLIN CLATTERBUCK, ROBERT A. CLATTERBUCK, JOHN V. TAYLOR, JOHN ARTHUR CARTER, and EDDIE BROWN

DOCKET ENTRIES IN CASE NO. 5467, CRIMINAL

1923.

Dec. 14. Criminal Information for Vio. Act Oct. 28, 1919, title 2, Secs. 3 and 25 filed. (Unlawful manufacture and possession of intoxicating liquor and possession of property designed for the unlawful manufacture of intoxicating liquor).

" " Traversers Carter and Brown arraigned and plead "Guilty".

" " Judgment: That the traversers John Arthur Carter and Eddie Brown each be imprisoned for sixty days in the Baltimore City Jail.

" " Commitments issued.

1924.

Jan. 12. Petition of John V. Taylor, Assent of U. S. Attorney and Order of Court authorizing P. A. Chamberlain, Group Head of the General Proh. Agents to deliver to petitioner or Mrs. Anna Taylor, his agent, one Buick Touring Car, engine #607051 upon payment of all costs filed.

" " Appearance of Harry W. Nice for traverser John V. Taylor Order filed.

[fol. 24]

Jan. 26. Petition of John Vance Taylor and Order of Court, that Bernard J. Lee, Warden of the Balto. City Jail bring or cause to be brought to this Court Edward Brown, and John Carter on January 28, 1924, at 10 o'clock, A. M. filed.

1924.

Jan. 28. Traversers Benjamin F. Clatterbuck, Robert A. Clatterbuck and John V. Taylor arraigned and each plead "Not Guilty".

" " Jury empanelled and sworn as to Benjamin Franklin Clatterbuck, Robert A. Clatterbuck and John V. Taylor.

" " Bailiff sworn.

" " Jury out with leave to seal their verdict.

" 29. Verdict (sealed) "Not Guilty" as to Benjamin Franklin Clatterbuck and Robert A. Clatterbuck and disagreement as to traverser John V. Taylor.

" " Judgment: Acquittal as to traversers Benjamin Franklin Clatterbuck and Robert A. Clatterbuck.

Feb. 5. Traverser John V. Taylor, c/o J. Abner Saylor recognized in sum of $1,500 with Mollie Saulsbury and Benjamin Saulsbury, her husband (2432 W. Balto. St.) in same amount for his appearance from day to day as required and until discharged in due course of law.

Mch. 5. Jury empanelled and sworn as to John V. Taylor.

" 6. Bailiff sworn.

" " Verdict "Guilty".

" " Judgment: That the traverser John V. Taylor be imprisoned for five months in the Baltimore City Jail.

" " Commitment issued.

Apr. 15. Order of Court directing destruction of all liquor and property seized in this case filed.

[fol. 25] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

versus

JAMES BORROUGHS and JOHN VANCE TAYLOR

CRIMINAL INFORMATION IN CASE No. 11696—Filed June 27, 1928

A. W. W. Woodcock, Attorney for the United States of America, in and for the District of Maryland, who for the

said United States in this behalf prosecutes, in his own proper person, comes into Court this 27th day of June, 1928, and gives the Court here to understand and be informed that James Borroughs and John Vance Taylor, each late of said District, heretofore, to wit, on the 2nd day of May, in the year of our Lord nineteen hundred and twenty-eight, at Anne Arundel County, in the State of Maryland and District aforesaid, did unlawfully have in their possession certain intoxicating liquor, to wit, 180 gallons corn whiskey, a more particular description of said intoxicating liquor is to the United States Attorney aforesaid unknown, the possession of said intoxicating liquor as aforesaid being then and there prohibited and unlawful; contrary to the form of the Statute in such case made and provided, and against the peace, government, and dignity of the United States.

Act October 28, 1919, Title 2, Section 3.

Second Count

And the said Attorney further gives the Court here to understand and be informed that James Borroughs and John Vance Taylor, each late of said District, heretofore, to wit on the 2nd day of May, in the year of our Lord [fol. 26] nineteen hundred and twenty-eight, at Anne Arundel County in the State of Maryland and District aforesaid, did unlawfully transport certain intoxicating liquor, to wit, 180 gallons corn whiskey a more particular description of said intoxicating liquor is to the United States Attorney aforesaid unknown, the transportation of said intoxicating liquor as aforesaid being then and there prohibited and unlawful; contrary to the form of the Statute in such case made and provided and against the peace, Government, and dignity of the United States.

Act October 28, 1919, title 2, section 3.

Wherefore the said Attorney in behalf of the United —— prays the consideration of the Court here in the premises and that due process of law may be awarded against the above-named defendant in this behalf to make answer to the United States touching and concerning the premises aforesaid.

A. W. W. Woodcock, United States Attorney.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

No. 11696, Criminal

UNITED STATES OF AMERICA

vs.

JAMES BURROUGHS and JOHN VANCE TAYLOR

DOCKET ENTRIES IN CASE NO. 11696, CRIMINAL

1928.

June 27. Criminal Information for Vio. Act Oct. 28, 1919, title 2 Sec. 3 filed. (National Proh. Act.)

[fol. 27]

June 29. Appearance of Samuel S. Levin for traversers Order filed.

" " Traversers arraigned and each plead "Guilty".

" " Judgment: That the traversers each pay a fine of Two Hundred Dollars and costs.

" " Fines and costs paid.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

No. 14374, Criminal

UNITED STATES OF AMERICA

vs.

JOHN VANCE TAYLOR

STIPULATION OF COUNSEL AS TO MAKING UP RECORD ON APPEAL—Filed May 18, 1931

It is hereby stipulated and agreed by and between counsel for the respective parties, that Rule 23 of the Circuit Court of Appeals for the Fourth Circuit shall apply and govern the making up and printing of the record in this case, and that the following portions of the record shall be incorporated into the transcript of record on appeal.

1. Indictment.
2. Plea.

3. Agreement of Parties waiving trial by Jury.
4. Motion to Suppress Evidence and Quash Indictment.
5. Order of Court overruling Motion to Suppress Evidence and Quash Indictment.
5½. Court records, former convictions.
[fol. 28] 6. Verdict and Judgment.
7. Bill of Exceptions.
8. Assignment of Errors.
9. This Stipulation.
10. Memorandum of the Clerk.
11. Order to Transmit Record.
12. Clerk's Certificate.

Simon E. Sobeloff, United States Attorney. Samuel S. Levin, R. Palmer Ingram, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OF THE CLERK

(1) Petition for Appeal filed 19th February, 1931.
(2) Appeal granted, 19th February, 1930.
(3) Appeal Bond, Dated —— —, ——. Penalty: $300.00. Obligors: John Vance Taylor, Principal, and Isaac J. Bartz and Reba Bartz, Sureties.
(4) Citation, Dated 18 June 1931. (Service acknowledged 29th June 1931.)

IN UNITED STATES DISTRICT COURT

ORDER TO TRANSMIT RECORD

And, thereupon, it is ordered by the Court here, that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals [fols. 29 & 30] for the Fourth Circuit, and the same is transmitted accordingly.

Teste:

Arthur L. Spamer, Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 3209.

John Vance Taylor, Appellant,

versus

United States of America, Appellee.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore.

July 11, 1931, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of R. Palmer Ingram and Helen Elizabeth Brown is entered for the Appellant.

July 17, 1931, the appearance of Simon E. Sobeloff, U. S. Attorney, is entered for the Appellee.

July 24, 1931, the appearance of Samuel S. Levin is entered for the Appellant.

July 25, 1931, twenty-five copies of the printed transcript of record are filed.

ARGUMENT OF CAUSE.

October 26, 1931 (October term, 1931), cause came on to be heard before Parker, Northcott and Soper, Circuit Judges, and is argued by counsel and submitted.

OPINION.

Filed January 12, 1932.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 3209.

John Vance Taylor, Appellant,

versus

United States of America, Appellee.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore.

(Argued October 26, 1931. Decided January 12, 1932.)

Before PARKER, NORTHCOTT and SOPER, Circuit Judges.

R. PALMER INGRAM and HELEN ELIZABETH BROWN (SAMUEL S. LEVIN on brief) for Appellant, and SIMON E. SOBELOFF, U. S. Attorney, (JAMES M. HOFFA, Assistant U. S. Attorney, on brief), for Appellee.

NORTHCOTT, Circuit Judge:

Appellant, hereinafter referred to as the defendant, was convicted in the District Court of the United States for the District of Maryland of having possession of intoxicating liquor in violation of the National Prohibition Act. The indictment alleged two former convictions against the defendant.

By agreement, the defendant was tried by the court, sitting as a jury, found guilty as charged in the indictment, and sentenced to be imprisoned three months in jail and to pay a fine of seven hundred and fifty dollars and costs. From this judgment this appeal was brought.

A squad of several prohibition agents, attached to the Baltimore office, in charge of one Ford, Deputy Prohibition Administrator, having had complaints against the property and information to the effect that liquor was being stored there in violation of the laws of the United States, went to a garage located on Curtis Avenue, in the City of Baltimore. On arriving at the premises the officers smelt whiskey in the building which was located in a yard some distance from a house used as a dwelling by the defendant, the garage being on Curtis Avenue and a small alley running along its side. A fence ran from the garage to the house.

After smelling the whiskey the officers testified they looked under and through a crack in the door of the garage and saw a number of cases of cartons, such as, according to the experience of the agents, are used to hold Mason jars, much used for carrying whiskey. The officers then entered the garage by a side door, pulling out a staple that held a hasp, and found in the building, contained in the cartons, seven hundred and thirty-two (732) gallons of whiskey. While the officers were searching the building the defendant appeared and denied that the whiskey was his or that he knew anything about it, but afterwards admitted that it was his. The officers knew that the defendant had been previously convicted of violating the National Prohibition Act.

On the trial objection was made to the evidence of the officers on the ground that their knowledge was acquired by an unlawful search.

This court has frequently discussed the issue raised by this appeal. In *Henderson* v. *The United States,*

12 Fed. (2) 528, in an able opinion Judge Parker held the search unlawful because the officers had entered the building, used in part as a dwelling, without sufficient cause. Again in *De Pater* v. *United States*, 34 Fed. (2) 275, this court held that the officers did not have sufficient cause to enter the building (a dwelling house). But in that case the court said:

"It is too well determined to require argument that knowledge of a crime may be acquired through the sense of smell alone."

In *Benton* v. *United States*, 28 Fed. (2) 695, an outbuilding, included in the fence around the dwelling, was entered by the officers after they saw and heard that which lead them to believe the law was being violated. The circumstances in the Benton case are almost identical with the instant case, and this court held the search was justified and lawful.

In the Benton case will be found a discussion of the authorities. The doctrine laid down in the leading case of *McBride* v. *United States*, 284 Fed. 416, is approved. In the McBride case the court held that it was lawful to arrest a person without warrant, where a crime is being committed in the presence of an officer, that it is lawful to enter a building without a warrant within which such crime is being perpetrated, and that, where an officer is made aware by any of his senses that a crime is being committed, it is being committed in his presence, so as to justify an arrest without a warrant.

Again this court, in the case of *Mulrooney et al.* v. *United States*, 46 Fed. (2) 995, held a similar search to be lawful. The building in the Mulrooney case was used in part as a dwelling. The officers, as here, were led by the sense of smell to look through the transom over the door and saw what they took to be a barroom. They then entered and searched the building. The court said:

"To the knowledge that a crime was being committed, acquired by the sense of smell, was added the knowledge acquired by the sense of sight, when the agent looked through the open transom. The knowledge thus acquired was confirmed after entry of the agents and

before any search by the admission of Mulrooney. No objection was made by Mulrooney to the search of that part of the premises used as a dwelling. The facts and circumstances before the officers were such as to warrant men of prudence and caution in believing that the offense had been committed, and they were justified in their actions."

Here the defendant had the reputation of being a violator of the National Prohibition Law. The officers knew he had been convicted of such a violation. Complaints had been made to them about the garage being used for the storing of whiskey used in such violations. The sense of smell directed them to the building and before entering it what they saw from the outside confirmed their prior knowledge. After entering they found a large quantity of unlawful liquor, the possession of which could only mean one thing—that the law was being violated and in a wholesale way. Such a quantity of whiskey could only be stored in this garage for the purpose of making many sales, each a felony under the law. The garage was not directly connected with the dwelling house.

In *United States* v. *Lorenz*, 17 Fed. (2) 829, the court said:

"A dwelling house affords no sanctuary to crime, no exemption from taxes, no refuge for criminals and their activities, known to be within."

Certainly no sanctity is attached to the garage in this case. The officers were fully justified in what they did and the search was not unreasonable, as contended, within the contemplation of the Fourth and Fifth Amendments to the Constitution of the United States.

An examination of the following cases will support the conclusion reached by us.

United States v. *Nobriga et al.*, 19 Fed. (2) 92.
Kasprowicz v. *United States*, 20 Fed. (2) 506.
United States v. *Berger et al.*, 22 Fed. (2) 867.
United States v. *Vottiero*, 25 Fed. (2) 346.

United States v. *Backer*, 32 Fed. (2) 936.
United States v. *Borkowski*, 268 Fed. 408.
United States v. *Lindsly*, 7 Fed. (2) 247.

The cases cited by the attorneys for appellant are either not in point or not controlling on this court.

The question was also raised on behalf of the appellant that the sentence was improper because the record did not properly prove two prior convictions for possession. One of the convictions relied upon by the government was a verdict of guilty under an indictment charging the unlawful possession and manufacturing of intoxicating liquor, where the court sentenced the defendant to five months in jail. It is contended that because the sentence was one that could only have been given for manufacture and could not have been given for possession the verdict did not have the effect of a conviction for possession. There is no merit in this contention.

United States v. *Watkinds*, 6 Fed. 152.
Klein v. *United States*, 14 Fed. (2) 35.

In any event the sentence in the former case showing a verdict of guilty of possession cannot now be attacked collaterally.

Anderson v. *Treat*, 172 U. S. 24.

Also in the indictment the allegation is made of a former conviction for possession and transportation where the defendant pleaded guilty. There is no attack on the sentence in the latter case.

There was no reversible error in the trial, and the judgment of the court below is accordingly

Affirmed.

UNITED STATES, APPELLEE.

JUDGMENT.

Filed and Entered January 13, 1932.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 3209.

John Vance Taylor, Appellant,

vs.

United States of America, Appellee.

Appeal from the District Court of the United States for the District of Maryland.

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

ELLIOTT NORTHCOTT,
U. S. Circuit Judge.

January 13, 1932.

ORDER STAYING MANDATE.

Filed January 14, 1932.

(Style of Court and Title Omitted.)

Upon the Application of John Vance Taylor, Appellant, by R. Palmer Ingram and Samuel S. Levin, his counsel, and for good cause shown,

It Is Ordered that the mandate of this Court in the above case be, and the same is hereby, stayed pending the application of the said Appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the Clerk's Office of the said Supreme Court within 30 days from this date.

JOHN J. PARKER,
U. S. Circuit Judge.

January 14, 1932.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause, as the same remain upon the record and files of the said Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Charlotte, North Carolina, this 27th day of January, A. D., 1932.

(Seal of Court)

CLAUDE M. DEAN,
Clerk U. S. Circuit Court of Appeals,
Fourth Circuit.

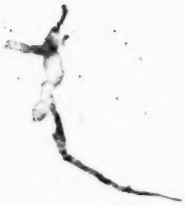
[fol. 39] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 28, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, and the case is assigned for argument on Monday, April 11th next, after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,507. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 693. John Vance Taylor, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed February 11, 1932. File No. 36,507.



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FEB 1
CHARLES ELM

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 693

JOHN VANCE TAYLOR,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

R. PALMER INGRAM,
Counsel for Petitioner.

HELEN ELIZABETH BROWN,
Of Counsel.

The Daily Record Co. Print, Baltimore

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. .

JOHN VANCE TAYLOR,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Justices of the Supreme Court of the United States:

The Petitioner, John Vance Taylor of Baltimore, Maryland, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit entered in the above entitled case on the 13th day of January, 1932 (R. 32-36), affirming a judgment of the United States District Court for the District of Maryland (R. 16-19), upholding the search of a garage which was part of a residence premises at 2:30 at night without a search warrant.

QUESTIONS PRESENTED.

1. Whether the protection afforded a "private dwelling" by Section 25, Title 2 of the National Prohibition Act, or a "house" by the Fourth Amendment to the

Constitution of the United States extends to the garage on the same city lot and used as a part of the residence premises?

2. Whether the unlawful breaking, forcible entry and search of the garage used as part of the residence premises at 2:30 at night *was reasonable* within the contemplation of the Fourth and Fifth Amendments to the Constitution of the United States?

3. Whether the search and seizure was not the primary object of the arresting officers as no person was present and engaged in the commission of any offense at the time of the entry?

4. Whether the evidence so obtained and the information gained as a result of such search and seizure should have been admitted in evidence over the seasonable objection of the defendant (appellant)?

STATEMENT.

On the night of November 19, 1930, a squad of more than six Prohibition Agents returning to Baltimore City after patrolling the roads in the vicinity for half the night, fell to discussing a premises in the Curtis Bay section of the City about which they had complaints. They were skeptical about these complaints and had not made any investigation because the place in question was just across the alley from a police station. As a result of this discussion they decided to investigate and arrived at Petitioner's home at about 2:30 on the morning of November 20th. The premises consisted of a house and a one-car, metal garage built on a corner city lot. A board fence extended from the back of the house to one side of the garage. The double doors of the garage opened onto the side street. One side of the garage extended along

the end of the lot next to an alley. When the agents arrived at the premises at this hour of the night they saw no one and saw no evidence of any activity whatever. They walked up to the double doors of the garage and pulled them open as far as the hasp would allow, thereby making a small crack between the doors. One of the agents held a flashlight to an inch and a half or two inch crack underneath the doors. Through these cracks the agents claimed they saw pasteboard cartons which contained ordinary Mason jars. They could not see inside the cases and admitted they did not know what was in them. Two of the agents said they got the odor of whisky while they were looking through the cracks, but the agent, longest in the service, who was holding the flashlight to the crack under the doors, testified that he could not say he detected the odor of whisky. The agents then discovered a small door in the side of the garage which was enclosed by the fence and which opened into Petitioner's back yard. One agent entered the back yard by climbing over the fence. Going to the door which led into the garage he broke off the hasp and in this way entered the garage where one hundred twenty-two cases of white corn whisky were found. After the entry had been made and while the search was in progress, the Petitioner appeared on the sidewalk, was arrested by two of the agents and taken into the garage which was being searched by other agents. After his arrest, Taylor was permitted to go into the house for his coat and the agent who went with him and other agents testified that the premises was used as the private home of Petitioner. The agents had no search warrant for the garage and at no time had they endeavored to obtain a search warrant from the United States Commissioner.

As a result of this search and seizure an indictment was filed against Petitioner charging violation of Title 2, Sec-

tions 3, 25 and 29 of the Act of October 28, 1919, known as the National Prohibition Act. A Motion to Suppress the Evidence and Quash the Indictment was filed and overruled by the trial Court. A plea of "not guilty" was entered, a jury trial waived, and the Court, sitting as a jury, found Petitioner guilty as charged in the indictment and sentenced him to be imprisoned for three months in jail and to pay a fine of Seven Hundred Fifty ($750.00) Dollars and costs.

From this judgment the Petitioner appealed to the Circuit Court of Appeals, and upon which appeal the Circuit Court of Appeals rendered an opinion and made an Order affirming the judgment of the District Court.

The Petitioner, before his trial, sought to suppress the evidence on the ground that the search and seizure were illegally made. This was the precise point raised in the Circuit Court of Appeals. The Circuit Court of Appeals, however, affirmed the judgment of the District Court on the ground that the garage was not directly connected with the dwelling house.

SPECIFICATIONS OF ERRORS.

1. The Circuit Court of Appeals erred in its ruling that the garage was no part of the private dwelling.

2. The Circuit Court of Appeals erred in holding that the unlawful breaking, forcible entry and search of these premises at 2:30 at night without a search warrant was not unreasonable within the contemplation of the Fourth and Fifth Amendments to the Constitution of the United States.

3. The Circuit Court erred in ignoring the difference laid down by this Honorable Court between the *search of*

a permanent structure for which a proper warrant may be obtained and the *search of a moving vehicle.*

4. The Court erred in attempting to justify the forcible entry on the ground that an odor of whisky was evidence of a crime committed in the presence of the officers when in fact no one was in the garage and the officers knew no person was present and committing a crime.

5. The Circuit Court erred in admitting the evidence so obtained and the information gained as a result of such search and seizure, a seasonable objection having been interposed.

REASONS FOR GRANTING THE WRIT.

1. The opinion of the Circuit Court of Appeals is unsound in law and is against the weight of adjudicated cases.

2. The opinion of the Circuit Court of Appeals is based upon decisions in cases where search warrants had been issued or where the facts were entirely different from those in the instant case.

3. The Circuit Court of Appeals has rendered its opinion against the provisions of the Constitution of the United States and the Amendments thereto, and more particularly the Fourth and Fifth Amendments.

4. The question is of great importance affecting the Constitutional rights against illegal search and seizure, without a search warrant, of probably millions of citizens having homes, in that the Court is called upon to define a "private dwelling" (concerning which term as used in Section 25, Title 2 of the National Prohibition Act, there is much conflict in the Circuits) and what protection from

search and seizure is given a private dwelling by Section 25, Title 2 of the National Prohibition Act and by the Fourth Amendment to the Constitution of the United States.

5. There is much conflict on the question. The District Courts of the First and Second Circuits and the Circuit Courts for the Fifth, Sixth, Eighth and Ninth Circuits uphold Petitioner's contention, while the Circuit Court for the Fourth Circuit alone denies it, and the question has not been raised or decided in the other Circuits as far as counsel have been able to ascertain.

6. To give sanction to the decision of the Circuit Court of Appeals in the instant case, would be tantamount to nullifying and rendering meaningless the Act of November 23, 1921, Ch. 134, Par. 6, 42 Stat. at L. 222, 223, 18 U. S. C. A., Sec. 53, in which Congress made it a criminal offense, punishable by heavy penalties, for any officer, agent, or employee of the United States, engaged in the enforcement of any law, to invade the homes of the people and violate the privacies of life without a warrant.

7. To sanction this decision would be to allow petty Government officers to usurp judicial powers and set up their own opinions as a substitute for the judicial determination of probable cause supported by the oath or affirmation required by the Constitution before homes can be invaded in a search for evidence.

8. If the decision of the Circuit Court of Appeals is permitted to stand it will encourage federal prohibition agents to violate the very law they were employed by the United States Government to enforce and to violate the Constitutional protection guaraneed to citizens and their

homes by the Fourth and Fifth Amendments to the Constitution of the United States, and the peaceful and quiet enjoyment of their homes by citizens in either day or night time will constantly be subject to invasion and exploratory searches without legal process by Government officers whose curiosity is aroused or who wish to test speculations resulting from anonymous complaints.

9. The question involved is of vital importance to every citizen and merits the consideration of this Honorable Court.

For the foregoing reasons and those which hereinafter appear in the brief and argument, your Petitioner respectfully prays that his petition be granted.

R. PALMER INGRAM,
Counsel for Petitioner.

HELEN ELIZABETH BROWN,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1931.

No. .

JOHN VANCE TAYLOR,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit has not been officially reported up to the time of the filing of this Brief. The opinion was rendered on the 12th day of January, 1932, and is set forth on pages 32-36 of the Record.

JURISDICTION.

1. The date of the judgment to be reviewed is January 13, 1932 (R. 37). On January 14, 1932, the Circuit Court of Appeals for the Fourth Circuit passed an Order staying its mandate to the District Court provided that your Petitioner file his application for a writ of certiorari in this Honorable Court within thirty days from said date (R. 37-38).

2. The nature of the case and the rulings below which are sought to be reviewed herein are stated in the Petition for Certiorari and are discussed hereinafter in this Brief.

3. The statutory provision invoked to sustain the jurisdiction of this Honorable Court is the Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stats. 938.

STATEMENT OF CASE.

A statement of the case has been given in the Petition for Certiorari, and in the interest of brevity is not repeated here.

SPECIFICATIONS OF ERRORS.

1. The Circuit Court of Appeals erred in its ruling that the garage was no part of the private dwelling.

2. The Circuit Court of Appeals erred in holding that the unlawful breaking, forcible entry and search of these premises at 2:30 at night without a search warrant was not unreasonable within the contemplation of the Fourth and Fifth Amendments to the Constitution of the United States.

3. The Circuit Court erred in ignoring the difference laid down by this Honorable Court between the *search of a permanent structure* for which a proper warrant may be obtained and the *search of a moving vehicle.*

4. The Court erred in attempting to justify the forcible entry on the ground that an odor of whisky was evidence of a crime committed in the presence of the officers when in fact no one was in the garage and the officers knew no person was present and committing a crime.

5. The Circuit Court erred in admitting the evidence so obtained and the information gained as a result of such search and seizure, a seasonable objection having been interposed.

ARGUMENT.

This case presents a question of the greatest importance, affecting the Constitutional rights against illegal search and seizure, without a search warrant. The question is as to the right of Government agents to forcibly enter the house of a citizen of the United States without a search warrant at 2:30 at night and there make an illegal search and seizure of intoxicating liquors in violation of the Petitioner's Constitutional rights. In the trial Court the Government admitted that the premises concerned is a private dwelling occupied as such by the Petitioner (R. 16).

There is some conflict of authority concerning the definition of the term "private dwelling" in the different Courts, Circuit and District, but in the instant case the Circuit Court of Appeals goes far beyond any reported case in denying to any part of a premises used as a home the protection of Section 25, Title 2 of the National Prohibition Act and of the Fourth Amendment.

The effect of the opinion of the Circuit Court of Appeals is to place an unjustifiably narrow interpretation upon the term "private dwelling" as used in Section 25, Title 2, National Prohibition Act, and to limit the Fourth Amendment to the Constitution by such interpretation. Such an interpretation is in direct conflict with a prior decision of the Circuit Court of Appeals in Henderson v. United States, 12 F. (2) 528, 529, one of the cases cited in the opinion of the Circuit Court. The Court has at-

tempted, in the opinion of counsel, to divorce from the main house those buildings convenient and necessary to the occupancy of the premises described as "within the curtilage."

It has repeatedly been held that a garage is a part of a residence premises, and such ruling is upheld by Hale, Blackstone, Greenleaf, Bishop and all the textwriters.

Temperani v. United States, 299 Fed. 365.
Bare v. Commonwealth, 122 Va. 783.
Devoe v. Commonwealth, 3 Met. 316, 325.
United States v. Slusser, 270 Fed. 818.

But, so far as Constitutional rights are concerned, it is of no consequence whether the place where the liquors were seized is characterized as a "private dwelling" or a "house" within the meaning of the Fourth Amendment. The protection of the Fourth Amendment includes garages, barns and other structures.

Temperani v. United States, supra.
United States v. Slusser, supra.

The search of a dwelling for intoxicating liquor without a warrant is strictly prohibited. And the issuance of a search warrant for such a premises is definitely limited.

National Prohibition Act, Sec. 25, Title 2, 27 U. S. C. A., Sec. 39;
Espionage Act of June 1, 1917, Title 11, 18 U. S. C. A., Sec. 611 et seq.;
Singleton v. United States, 290 Fed. 130;
Staker v. United States, 5 F. (2) 312;
Lindsly v. United States, 12 F. (2) 771;
Thompson v. United States, 22 F. (2) 134;
Carroll v. United States, 267 U. S. 132;

Agnello v. United States, 269 U. S. 20, 30;
United States v. Dean, 50 F. (2) 905, 906;
Schroeder v. United States, 14 F. (2) 500;
Alvau v. United States, 33 F. (2) 467, 470.

In Thompson v. United States, supra, previously decided, the Circuit Court of Appeals, speaking through Judge Soper, said:

> "It is well settled that the effect of the provisions of the Fourth Amendment to the Constitution of the United States, of Section 25 of title 2 of the National Prohibition Act (27 U. S. C. A., Sec. 39), and title 11 of the Espionage Act of June 15, 1917 (40 Stat. 288; 18 U. S. C. A., Sec. 1611 et seq.), is to forbid the search of a private dwelling by a national prohibition agent without a search warrant, and to require that a search warrant shall not issue to search a private dwelling, unless it is being used for the unlawful sale of intoxicating liquor."

In Staker v. United States, 5 F(2) 312, 314, the Circuit Court of Appeals, Sixth Circuit, said:

> "The officers had no probable cause to believe from the smell alone that the dwelling house was being used for sales. *The situation did not justify a search without a warrant* (Italics ours). The policy of the Statute goes far to restrict the right of searching a dwelling even with a warrant. Such policy cannot be frittered away by granting a broader right of search without a warrant."

This Honorable Court in Agnello v. United States, supra, citing the Temperani case, condemned the search of dwellings without a warrant. Mr. Justice Butler said:

> "While the question has never been directly decided by this Court, it has always been assumed that

one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein."

Boyd v. United States, 116 U. S. 616, 624 et seq. 630.
Weeks v. United States, 232 U. S. 383.
Silverthorne Lumber Co. v. United States, 251 U. S. 385.
Gouled v. United States, 255 U. S. 298, 308.

"The protection of the Fourth Amendment extends to all equally,—to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant. On the other hand, special limitations have been set about the obtaining of search warrants for that purpose. Thus, the National Prohibition Act, approved October 28, 1919, c. 85, Tit. 11, sec. 25, 41 Stat. 305, 315, provides that no search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor or is in part used for business purposes, such as store, shop, saloon, restaurant, hotel or boarding house.

"And later to the end that government employees without a warrant shall not invade the homes of the people and violate the privacies of life, Congress made it a criminal offense, punishable by heavy penalties, for any officer, agent or employee of the United States engaged in the enforcement of any law to search a private dwelling house without a warrant directing such a search.

Act of November 23, 1921, c. 134, sec. 6, 42, Stat. 222, 223.

"Safeguards similar to the Fourth Amendment are deemed necessary and have been provided in the

Constitution and laws of every state of the Union. We think there is no State Statute authorizing the search of a house without a warrant; and, in a number of States laws recently enacted for the enforcement of prohibition in respect of intoxicating liquors, there are provisions similar to those in sec. 25 of the National Prohibition Act. Save in certain cases incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant.

"Absence of any judicial approval is persuasive authority that it is unlawful. See

Entick v. Carrington, 19 Howard's State Trials, 1030, 1066.

"Beliefs however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause. See

Temperani v. United States, 229 Fed. 365.
United States v. Rembert, 284 Fed. 996, 1000.
Connelly v. United States, 275 Fed. 509.
McClurg v. Brenton, 123 Ia. 368, 372.
People v. Margolis, 200 Mich. 431.
Childers v. Commonwealth, 198 Ky. 848.
State v. Warfield, 184 Wis. 56.

"The search of Frank Agnello's house and seizure of the can of cocaine violated the Fourth Amendment."

ENTRY BY FORCE AT 2:30 AT NIGHT.

The breaking into and search of any building at 2.30 o'clock at night is unreasonable and a wanton violation of the Fourth Amendment. The violation of the Constitution becomes even more grave when the building forcibly entered and searched was part of a dwelling and the occupant was aroused from his sleep.

In Alvau v. United States, 33 F(2) 467, 470, the Circuit Court of Appeals for the Ninth Circuit, said:

> "Forcibly and in the nighttime to enter an occupied residence, even though it is thought to be used in part for unlawful purposes, is likely to be attended with disorder, and to result in violence and tragic consequences. We feel constrained to hold that the search was unreasonable and in violation of the Constitutional rights, and that therefore the evidence was inadmissible."

This phase of the case was not considered in the opinion of the Circuit Court in the instant case. And the Circuit Court disregarded the ruling often laid down by this Honorable Court concerning the difference between the search of a permanent structure and a moving vehicle, and repeated in the *Agnello Case:*

> "We have made a somewhat extended reference to these Statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structures in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

NO PERSON PRESENT.

The forcible entry and search in this case could not have come within the exception mentioned in the Agnello Case of a search "incident to a lawful arrest," because no person was present. No one was engaged in the commission of a crime and subject by reason thereof to arrest. There was no one in the garage and the Govern-

ment agents not only did not suspect that anyone was there, but they actually *knew* by peeping through cracks between the doors before they forced their way in that no one was there. The search and seizure cannot be justified as incident to a lawful arrest.

Temperani v. United States, 299 Fed. 365.
Henderson v. United States, 12 F(2) 528.
Alvau v. United States, 33 F(2) 467.
United States v. Dean, 50 F(2) 905.
DePater v. United States, 34 F(2) 275.

In Alvau v. United States, supra, prohibition agents, without a search warrant, went to the defendant's residence at 3.00 o'clock during the night. Some distance from the house they detected an odor of fermenting mash which grew stronger as they approached. They investigated the barn and found in the yard a surface cesspool which was warm and from which arose the odor of fermenting mash. When they received no response to their demands for admission to the house they broke open a basement door and the search finally resulted in the discovery of a secret door in the wall of the basement which led to underground chambers where a distilling operation was discovered.

In condemning this search and seizure the Court said that the forcible entry of the house was not justified, especially since the circumstances within the knowledge of the officers were barely sufficient even in the most favorable view to authorize a magistrate to issue a search warrant.

The Court declared:

"There was here no emergency; it is not a case of a rapidly moving automobile or other instrumental-

> ity employed in violation of the law, or of an outcry from a closed building of murder, or robbery, where immediate action is often necessary. If the information obtained by the government through the sense of smell was sufficient to authorize the issuance of a search warrant, there was no reason why the officers should not have made application therefor, and thus have proceeded in an orderly manner."

Following the rulings of this Honorable Court, evidence was suppressed by reason of an illegal search and seizure in a case paralleling the one at bar with the exception that the defendant in that case was present and refused the agents permission to enter his garage before they began their search. In allowing the Motion to Suppress the Evidence, the Court in United States v. Dean, supra, said:

> "The search was clearly illegal. Officers have no right to enter private buildings without legal justification. Where officers have knowledge that a person in the building is in the act of committing a felony, or possibly a misdemeanor, they may enter without a warrant in order to arrest him and to suppress the crime, and they may enter to arrest a person against whom a warrant is out or who is reasonably suspected of having committed a felony. I am aware of no other cases in which officers are justified in forcing an entrance without a warrant into private property. These principles have been so often stated that a citation of authorities is perhaps unnecessary, but the following may be referred to: Amos v. U. S., 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654; Raniele v. U. S., 34 F. (2d) 877 (C. C. A. 8); Temperani v. U. S., 299 F. 365 (C. C. A. 9); U. S. v. Di Corvo (D. C.) 37 F. (2d) 124 (discussing cases); Russell v. State, 37 Okl. Cr. 71, 256 P. 758."

ADMISSIBILITY OF EVIDENCE.

A seasonable objection was made to the use of evidence resulting from this search on the ground that it was obtained by an illegal search and seizure and for that reason violated sec. 25, tit. 2, National Prohibition Act and the Fourth and Fifth Amendments to the Constitution of the United States. In accordance with prior rulings of the Circuit Court of Appeals for the Fourth Circuit and of this Honorable Court the evidence offered in this case was not admissible against the Petitioner.

Mahoney v. United States (C. C. A. 4th) 26 F. (2) 902;.
Snyder v. United States (C. C. A. 4th) 285 Fed. 1;
Byars v. United States, 273 U. S. 28.

In Snyder v. United States, supra, Judge Groner, speaking for the Circuit Court of Appeals for the Fourth Circuit, said:

"In the Federal Courts evidence obtained from defendant by an unlawful search is inadmissible against him.

Boyd v. United States, 116 U. S. 616;
Weeks v. United States, 232 U. S. 383;
Silverthorne Lbr. Co. v. United States, 251 U. S. 385;
Gouled v. United States, 255 U. S. 398;
Amos v. United States, 255 U. S. 313."

In Byars v. United States, 273 U. S. 28, the defendant was convicted of the possession of strip stamps which were admitted in evidence over his objection that they had been obtained by an unlawful search and seizure. A timely motion made by the defendant was overruled by the trial Court. In reversing the Circuit Court of Ap-

peals which affirmed the judgment of the trial Court, Mr. Justice Sutherland said:

> "Nor is it material that the search was successful in revealing evidence of a violation of a Federal statute. A search prosecuted in violation of the Constitution is not made lawful by what is brought to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our Constitutional system that evidence of crime discovered by a Federal officer in making a search without a lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed."

The above cases were characterized by the Circuit Court of Appeals as "either not in point or not controlling on this court."

CASES CITED.

The Circuit Court based its opinion on

United States v. Nobriga et al., (D. C. of R. I. 1927) 19 Fed. (2) 92.

Kasprowicz v. United States, (C. C. A. 6th, 1927) 20 Fed. (2) 506;

United States v. Berger et al., (D. C. of Mass. 1927) 22 Fed. (2) 867;

United States v. Vottiero, (D. C.—S. D. of N. Y. 1928) 25 Fed. (2) 346;

United States v. Backer, (D. C.—N. D. of Calif. 1929) 32 Fed. (2) 936;

United States v. Borkowski, (P. C.—S. D. of Ohio, W. D. 1920) 268 Fed. 408;

United States v. Lindsly, (D. C.—E. D. La. 1925) 7 Fed. (2) 247.

With the single exception of the Kasprowicz case, supra, these are District Court opinions. The case of

United States v. Lindsly, supra, was reversed by the Circuit Court of Appeals for the Fifth Circuit (1926) 12 F. (2) 771. The Kasprowicz case involved the issuance of a search warrant for the basement of a house used as a dwelling where beer was being manufactured on a large scale. In that case, as the Court said, "The question sharply presented is whether the manufacture of intoxicating liquor in a dwelling house may be of such commercial character as to justify a search warrant." Prohibition agents had observed the operations about this premises for three days. Their observations, contained in the affidavit for the search warrant, were held to justify a conclusion that beer was being manufactured on a commercial scale for commercial purposes. There was no attempt to search the premises without a warrant.

United States v. Nobriga, supra, a Rhode Island District Court case, is concerned with violations of the internal revenue laws. The defendants were indicted on six counts for conducting a distillery without registering the still and otherwise failing to comply with revenue regulations. A search warrant was issued on the affidavit of an agent that he saw a still in operation and smelled fermenting mash. The Court declared that Section 25, title 2 of the National Prohibition Act "is applicable solely to offenses under the National Prohibition Act," and overruled a motion to quash the search warrant made on the ground that it was improvidently issued on an insufficient affidavit. This was a search with a warrant, and not one made without prior judicial determination of probable cause for the search of a permanent structure such as the search in the instant case.

The decision in United States v. Berger, supra, is by the District Court of Massachusetts and was made in a case where officers watching a dwelling house saw five-

gallon cans carried from it and taken away in an automobile. The automobile was searched and found to contain liquor. An odor of mash from the house was detected. A search warrant was applied for and obtained upon an affidavit stating these facts. A search under the warrant disclosed a still of commercial size. By a series of assumptions and inferences and by reading into Section 25 words it does not contain, the conclusion was reached that the search warrant was properly issued. But even in this case, the officers did not undertake to pass on probable cause themselves and search the premises without a warrant.

United States v. Vottiero, supra, was decided by the District Court for the Southern District of New York. In this opinion Section 25 was stretched to the breaking point to uphold a search warrant for a garage in the basement of a private dwelling, nevertheless the garage was considered an integral part of the residence. The question in this case was whether the search warrant was properly issued, and not the total absence of a search warrant for the search of a home at 2:30 at night.

In United States v. Backer, supra, the District Court for the Northern District of California decided a search warrant for a private dwelling was legally issued because the affidavit supporting it showed that it was being used for the unlawful sale of intoxicating liquor.

The case of United States v. Barkowski, supra, was decided by the District Court for the Southern District of Ohio, May 24, 1920. It upheld the search of a private dwelling without a warrant when officers were appraised by sight and odor that a whisky manufacturing operation was going on inside. On November 23, 1921, "An Act Supplemental to the National Prohibition Act" became

law and totally destroyed the effect of this decision when by Section 6 thereof it was made a crime for any officer of the United States to search a private dwelling without a warrant. Its sole aim and purpose was to protect the home against searches without warrants which in themselves are abhorrent to our laws, as this Honorable Court has said, and in direct violation of the Fourth Amendment to the Constitution. Furthermore, the decision in Carroll v. United States, supra, making a necessary distinction between the searches of buildings and vehicles, had not been handed down.

In United States v. Lindsly, supra, the District Court for the Eastern District of Louisiana, disregarding Section 25, title 2 of the National Prohibition Act, Section 6 of the Supplemental Act and the Fourth Amendment to the Constitution, upheld the search of a home without a warrant. While admitting that there was no question of the search of a private dwelling in McBride v. United States, 284 Fed. 416, (C. C. A. 5th) the District Court nevertheless based its opinion on the McBride case and upon the common law rule that an officer could arrest a *person* for a crime committed in his presence. This decision was reversed, 12 F. (2) 771 (C. C. A. 5th). The District Court said:

> "Under the facts as developed on the motion to suppress the evidence, the court concluded that a search warrant was unnecessary, as the evidence showed that before the government officers entered the property, they had ample knowledge through their senses of sight and smell, that an offense was being committed in their presence, and the court considered that the law justified the arrest of an offender and the entering of his property by the government officers for this purpose, as well as for the purpose of search, if and when a violation of the law was being committed in their presence, and the court

considered that the law justified the introduction before the jury of any evidence discovered at the time of the arrest of the offender or of the entering of his property, if and when the officers were justified in making either such arrest (which in this case was not made, as defendant was absent), or such entry because of their knowledge, through their senses, of the commission of an offense then taking place in their presence."

The Circuit Court of Appeals for the Fifth Circuit, basing its reversal of the District Court on the authority of the *Agnello Case,* after commenting on evidence to the effect that before the officers entered defendant's house some one else, whose identity was not established, poured out large quantities of wine, some of which ran into the street, and made his escape, said:

"The officers did not discover defendant in the commission of any crime, *nor did they go to his home for the purpose of making an arrest.* (Italics ours.)

"Section 25 of title 2 of the National Prohibition Act (Comp. St. Ann. Supp. 1923, sec. 10138½m) provides that no search warrant shall issue to search any private dwelling, unless it is being used for the unlawful sale of liquor, or in part for some business purpose, and Section 6 of the Act of November 23, 1921, 42 Stat. 223 (Comp. St. Supp. 1925, Sec. 10184a), makes it an offense for a prohibition officer to search a private dwelling without a search warrant. In Pressley v. United States, 289 F. 477, this Court held that the search of a private dwelling under a warrant which failed to charge an unlawful sale was unauthorized, and that evidence procured by such a search was inadmissible. And our ruling in Voorhies v. United States, 299 F. 275, is to the same effect.

"Here no warrant was procured, and no attempt was made to comply with Section 25 of the Prohibi-

> tion Act. * * * It is suggested by the government that the officers were made aware of violations of the law by seeing and smelling the wine which had been poured out on the premises, and that therefore it was proper to receive the evidence. But it remains true that the officers did not acquire information which tended to show that a violation of the law had been committed as an incident to a lawful arrest, and we are of opinion that the evidence should have been rejected upon the authority of Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. ——, where it was plainly held that 'the search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws,' and that, 'save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant. * * * Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant.'
>
> "That case was decided since the trial of this case, and in our opinion compels the reversal of the judgment of the District Court."

The above cited cases were held to be in point and controlling upon the Circuit Court in its opinion in the instant case and upon them the Court based its opinion.

In DePater v. United States, 34 F. (2) 275, from which the statement is quoted that, "It is too well determined to require argument that knowledge of a crime may be acquired through the sense of smell alone," it was held that smell alone did not justify the search of a private dwelling in that case.

Benton v. United States, (Fourth Circuit, 1928) 28 F. (2) 695, cited in support of the opinion in this case is an example of how sometimes a Court in the pursuit of a

minor principle loses sight of more fundamental and basic principles and, unintentionally perhaps, encroaches upon and violates them. In the *Benton case* prohibition agents went to the home of the defendant during the night and secreted themselves in some vines near the defendant's yard. About daybreak they heard a pump being used in a woodshed near the defendant's dwelling house and saw the defendant and others carrying a can which they placed in a nearby automobile. The officers later found that the can contained five gallons of alcohol. Upon hearing the pump inside the shed being operated and seeing the can carried, the agents entered the defendant's premises, arrested him and a boy and searched the woodshed where they found a quantity of whisky. The Circuit Court justified this invasion on the ground that the officers saw a crime committed in their presence. However, this same Circuit Court was unwilling to fully condone this decision when it held in the DePater Case (1929), Judge Northcott who wrote the opinion in the Benton Case dissenting, that the odor of mash eminating from a dwelling house was not justification for breaking in and searching a house without a warrant. The Circuit Court reaffirmed the Henderson Case and said:

> "The effect of the decisions, while recognizing the right of search as an incident to a lawful arrest, is to require the utmost caution in the search of private residences and to require as a prerequisite thereto such a degree of certainty of the knowledge of both the nature and the instant perpetration of the crime as the officers herein failed to exhibit and as the evidence failed to disclose in the instant case."

Contrary to the statement in the Circuit Court's opinion in the case at bar that, "Here the defendant had the reputation of being a violator of the National Prohibition Law. The officers knew he had been convicted of

such a violation. Complaints had been made to them about the garage being used for the storing of whisky used in such violations," Agent Ford testified on direct examination (R. 10) that the complaints received were about "a place on Curtis Avenue that was being used to store whisky." Ford thought Taylor's name had been mentioned in the last complaint received, but none of the agents knew Taylor or had ever seen him until he appeared at his garage after the forced entry, search and seizure had been made. There was no evidence that Taylor had a reputation as a violator of the Prohibition Law. As a result of this invasion of his home, the agents later learned he had been convicted of liquor violations. But prior to the entry, they had no knowledge that it was Taylor who lived in this house, nor did they obtain any of this knowledge except as a result of this search.

The clear reasoning and accurate language of the Slusser case is likewise applicable to the case at bar:

> "An unlawful search cannot be justified by what is found. A search that is unlawful when it begins is not made lawful when it ends by the discovery and seizure of liquor. It was against such prying, on the chance of discovery, that the constitutional amendment was intended to protect the people.
>
> "Neither is the discretion of the officer, however good and well-intentioned, a substitute in law for a search warrant issued by a proper magistrate. It is to the latter that the law has committed the discretion to say when a warrant shall issue; and it can only issue on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized. *Constant reiteration of these fundamental principles is warranted by the fact that they seem to be so frequently overlooked.* (Italics ours.)

"The procedure for searches under the Volstead Law (41 Stat. 315) is prescribed by section 25 to be that defined in the Act of June 15, 1917, tit. 11, Compiled Statutes, Par. 10496¼a et seq. The entry without permission ,express or implied, into a private garage, without warrant, on a mission of search and seizure, by prohibition agents of the United States, is unlawful. Even a search for stolen goods requires a warrant. It was so by common law before the adoption of the Constitution. Lord Camden in Entick v. Carrington, 19 Howell's State Trials, at page 1067."

CONCLUSION.

It is respectfully submitted that the search of petitioner's garage, which was a part of his residence, at 2:30 o'clock during the night and in which no person was present committing a crime was unreasonable, unlawful, illegal, unauthorized and in violation of the Fourth and Fifth Amendments to the Constitution of the United States, contrary to Section 25, Title 2 of the National Prohibition Act, and to Section 6 of an Act Supplemental to the National Prohibition Act, approved November 23, 1921, and that the Circuit Court of Appeals for the Fourth Circuit erred in upholding such a search when a timely challenge to the evidence and information gained as a result of the search was interposed.

R. PALMER INGRAM,
Attorney for Petitioner.

HELEN ELIZABETH BROWN,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 693.

JOHN VANCE TAYLOR, PETITIONER,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S REPLY BRIEF TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

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The Daily Record Co. Print, Baltimore

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In The

Supreme Court of the United States

October Term, 1931.

No. 693.

JOHN VANCE TAYLOR, Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

PETITIONER'S REPLY BRIEF TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

Statement.

While the Rules of the United States District Court for the District of Maryland appear nowhere in the record of this case and they are not accorded judicial notice by this Honorable Court, Rule 39 of these Rules is quoted at length on page 4 of the Government's Brief. Petitioner feels that if this is to be allowed, a full statement of the surrounding facts should be made, and the following affidavit of Assistant United States Attorney James M. Hoffa setting forth said facts is, therefore, filed and included:

STATE OF MARYLAND,
CITY OF BALTIMORE, TO-WIT:

JAMES M. HOFFA, being first duly sworn according to law upon oath deposes and says: That on February 19, 1931, he was an Assistant United States Attorney for the District of Maryland and as such attorney conducted the prosecution of the case of UNITED STATES versus JOHN VANCE TAYLOR, and that he further settled the Bill of Exceptions prepared in the Appeal of said case to the United States Circuit Court of Appeals, Fourth Circuit, and that the matters hereinafter set forth concerning the preparation of said Bill of Exceptions and the happenings in connection therewith are true and correct to the best of his knowledge, information and belief. The verdict and judgment and Petition for Appeal and Order granting the same in this case were entered and filed on February 19, 1931. On March 14, 1931, the Bill of Exceptions was lodged by counsel for petitioner in the United States Attorney's office and on March 19, 1931, when no action had been taken by the United States Attorney's office, at the request of Mr. O. Norman Forrest, Assistant United States Attorney at that time, for the convenience of the Government, counsel for petitioner prepared a Petition and Order asking that the time for filing of the Bill of Exceptions be extended for a period of thirty days, and again on April 17, 1931, there still had not been any action on the part of the Government, he, Hoffa, being absent, temporarily assigned to the Prohibition Department, Washington, a further Petition and Order asking for another thirty day extension for the filing of said Bill of Exceptions was prepared by petitioner's counsel and duly signed by the District Judge. This last extension expired on Sunday, May 17, 1931. On Saturday, May 16, 1931, he, Hoffa, was engaged in examining the Bill of Exceptions, but when his examination was completed it was found that the District Judge, Honorable William C. Coleman, had gone for the day, when petitioner's counsel

and he went to the Judge's chambers about 11:30 in the morning. That it was then agreed that the Bill of Exceptions would be left with him and that he would present it to the District Judge and have it signed and file it on the following Monday, May 18, 1931. This was done.

And further this deponent saith not.

(Signed) JAMES M. HOFFA.

Subscribed and sworn to before me this 18th day of March, 1932.

(Signed) LORETTA B. SCHLINGMAN,

(Notary's Seal.) Notary Public.

(Original filed with the Clerk of the Supreme Court of the United States.)

ARGUMENT.

The Government's contention that the evidence in this case is not properly before the Court is untenable and is not supported by the decisions of this Honorable Court.

The final Order governing the filing of the Bill of Exceptions extended the time to May 17, 1931. The expiration day was Sunday. The Bill was signed and filed on Monday, May 18, 1931. The fact that the last day fell on Sunday operated to extend the time to the next day of which the business of the Court could legally be transacted.

In the construction of rulings of Court in respect to time for pleading and other mere matters of practice, it is well settled that if the last day falls on Sunday the party has the whole of the next day of which to perform

the act required, and in many of the States this ruling has been adopted by statute or ruling of Court.

26 R. C. L., Sec, 23.
American, English Ency. of Law, 2d ed., Vol. 28, p. 224.
In re Marcellino (Mass.), 171 N. E. 81.
Simmons v. Hanne, 50 Fla. 267.
Macertney v. Givin, 218 Ala. 529.
Bernadas v. Miller (La.), 129 So. 175.
Hotard v. Consolidated Companies, Inc. (La.), 130 So. 662.
Vohlers v. Stafford Manufacturing Co., 171 Mich. 8, 12.

The authorities are in agreement that when the extended return day falls on a *dies non*, the defendant has all of the next day to apply for an extension or to file the transcript.

Bernadas v. Miller, supra.

This Honorable Court has held that even where a law of Congress limits the time for the performance of an act, if the final day of such limited period falls on Sunday, the act may be performed on the succeeding day.

Street v. United States, 133 U. S. 299.

The above case concerned an Act of Congress which set January 1, 1879, as the last day on which the President of the United States could muster out supernumerary army officers. January 1, 1879, was Sunday, and it was held that the power under this statute could be exercised on the following Monday. Mr. Justice Brewer, speaking for the Court, said:

"Again, it must be noticed that the 1st day of January was Sunday, that is, a *dies non*, and a power

> that may be exercised up to and including a given day of the month may generally, when that day happens to be Sunday, be exercised on the succeeding day."

The question involved in Jennings v. Phil. Balt. & Wash. Ry. Co., 218 U. S. 255, cited by the Government, was whether the Supreme Court of the District of Columbia exceeded its jurisdiction in allowing a Bill of Exceptions after the close of the term at which the Judgment sought to be revised had become final. After discussing the circumstances and rules governing this particular case, this Honorable Court said:

> "A different case might arise if, by its failure to object the appellant had been misled to his injury. * * *
>
> "So grave a matter as the allowance of a bill of exceptions after the close of the term and after the court had lost all judicial power over the record should not rest upon a mere implication from silence. There should be express consent, or conduct which should equitably estop the opposite party from denying he had consented."

In the instant case there are both express consent and conduct which would equitably estop the Government from denying such consent. However, the Government is not denying consent, but on the contrary, those Government officers who have heretofore been in charge of the prosecution of this case readily admit such consent which is shown not only by affidavit but by the signed statement of the United States Attorney and his Assistant at the end of the Bill of Exceptions that, "This Bill of Exceptions is agreed upon" (R. 19), together with the date mark "5/18/31," which agreement includes time as well as contents.

An endorsement upon the Bill, "We agree upon the above, the foregoing Bill of Exceptions," signed by counsel after an extension by insufficient order, was held to be a waiver of any objections to the order in Gulf, C. & S. F. Ry. Co. v. Jackson, 64 Fed. 70.

It would be unjust and inequitable to allow the Government to raise this objection at this time and thereby profit by its own delay. The Government is estopped by its conduct from pursuing such a course or denying that it consented to the acts as performed.

The facts in the instant case bring it within the term "extraordinary circumstances" referred to in the decisions. In re Bills of Exceptions (C. C. A. 6) 37 F. (2) 849, 851, the Court said:

> "The illness or absence of the judge at the very end of the time limited, so that presentation cannot be made to him personally, is doubtless one of the 'extraordinary circumstances' sometimes referred to. (See cases, infra.) When the bill of exceptions is completed or thought to be ready for submission to the judge for his signature, and is tendered on or about the last day at his official residence, but cannot be actually presented because of illness or absence, we see no reason why this should not be considered as a constructive presentation to him at that time and place, giving opportunity for an effective bill of exceptions if he thereafter (at least promptly thereafter) approves and signs it; and this constructive presentation may well be the logical basis of the Chateaugay Case, 128 U. S. 544, 9 S. Ct. 150, 32 L. Ed. 508, and the Sater Case (C. C. A. 6) 223 F. 611, infra."

Not only is the Government's contention untenable, but the question cannot be raised at this time and it has been distinctly so held by this Court in Waldron v. Waldron,

156 U. S. 361. While it is true it does not appear from the record that the Bill of Exceptions was lodged with the United States Attorney on the 14th day of March, 1931, that fact was made immaterial when the Judge below settled the Bill. In City of Seattle v. Board of Home Missions of the M. P. Church, (C. C. A.) 138 Fed. 307, it was held that where a bill of exceptions not filed within the proper time was duly settled and certified by the court it was presumed on appeal that the court had relaxed the rule for some good reason and a motion to strike out the bill was denied.

It is also to be noted that the Government's Brief which should have been filed on Friday, March 11, 1932, under Rule 35, Section 3a, of this Court, was not filed until Saturday, March 12, 1932, and copy was not received by petitioner's counsel until Monday, March 14, 1932, the day set for presentation of the Petition for Writ of Certiorari. However, no point is made of this. If any objection could have been made, it should have been made by the Government at that time, and failure to make such an objection conclusively shows agreement on the part of the Government. The question here raised is controlled by the decision of this Court in Waldron v. Waldron, supra, in which, at page 378, Mr. Justice WHITE said:

> "The motion to dismiss or affirm is without merit. The signing of the bill of exceptions after the expiration of the term at which the judgment was rendered, was lawful if done by consent of parties given during that term. Hunnicutt v. Peyton, 102 U. S. 333; Davis v. Patrick, 122 U. S. 138; Michigan Ins. Bank v. Eldred, 143 U. S. 293.
>
> "The fact that the bill of exceptions was not handed to counsel for defendant on or before Nov. 15, 1890, does not appear of record, and if it did, it

would be rendered immaterial by the action of the judge below in settling the bill.

"If the bill was not delivered to counsel within the time fixed by the agreement, objection to the failure so to deliver it should have been urged when the bill was settled. And if an objection then taken was overruled, the question of the correctness of such action should have been then reserved."

CONCLUSION.

It is, therefore, contended that the evidence in this case is properly before this Court. Legally, the Bill of Exceptions was settled within the time limit of the final extension order, and the Government is estopped by its own conduct from urging the contention upon this Honorable Court.

Respectfully submitted,

R. PALMER INGRAM,

Counsel for Petitioner.

HELEN ELIZABETH BROWN,

Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 693.

JOHN VANCE TAYLOR,
Petitioner,

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UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF PETITIONER.

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 693.

JOHN VANCE TAYLOR,

Petitioner,

versus

UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF PETITIONER.

Opinions Below.

The opinion of the District Court (R. 16-19) is not reported. The opinion of the Circuit Court of Appeals (R. 32-36) is reported in 55 F. (2) 58.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered January 13, 1932 (R. 37). The Petition for Certiorari was filed February 12, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938.

Questions Presented.

1. Whether the protection afforded a "private dwelling" by Section 25, Title 2 of the National Prohibition Act, or a "house" by the Fourth Amendment to the Constitution of the United States extends to the garage on the same city lot and used as a part of the residence premises?

2. Whether the unlawful breaking, forcible entry and search of the garage used as part of the residence premises at 2:30 at night was *reasonable* within the contemplation of the Fourth and Fifth Amendments to the Constitution of the United States?

3. Whether the search and seizure was not the primary object of the arresting officers as no person was present and engaged in the commission of any offense at the time of the entry?

4. Whether the evidence so obtained and the information gained as a result of such search and seizure should have been admitted in evidence over the seasonable objection of the petitioner?

Statutes Involved.

The Fourth and Fifth Amendments to the Constitution of the United States, section 25 of title 2 of the National Prohibition Act and section 6 of the Act of November 23, 1921 (Willis-Campbell Act) are set forth in the appendix to this brief, pp. 31-33, infra.

Statement.

This case comes before the Court on writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit, affirming a judgment of the United States District Court for the District of Maryland upholding the search of a garage which was part of a residence premises, at 2:30 o'clock at night, without a search warrant and sustaining the conviction of petitioner on a charge of violation of Sections 3, 25 and 29 of Title 2 of the Act of October 28, 1919, known as the National Prohibition Act.

On the night of November 19, 1930, a squad of more than six Prohibition Agents returning to Baltimore City after patrolling the roads in the vicinity for half the night, fell to discussing a premises in the Curtis Bay section of the City about which they had complaints. They were skeptical about these complaints and had not made any investigation because the place in question was just across the alley from a police station. As a result of this discussion they decided to investigate and arrived at petitioner's home at about 2:30 on the morning of November 20th. The premises consisted of a house and a one-car, metal garage built on a corner city lot. A board fence extended from the back of the house to one side of the garage. The double doors of the garage opened onto the side street. One side of the garage extended along the end of the lot next to an alley. When the agents arrived at the premises at this hour of the night they saw no one and saw no evidence of any activity whatever. They walked up to the double doors of the garage and pulled them open as far as the hasp would allow, thereby

making a small crack between the doors. One of the agents held a flashlight to an inch and a half or two inch crack underneath the doors. Through these cracks the agents claimed they saw pasteboard cartons which contained ordinary Mason jars. They could not see inside the cases and admitted they did not know what was in them. Two of the agents said they got the odor of whisky while they were looking through the cracks, but the agent, longest in the service, who was holding the flashlight to the crack under the doors, testified that he could not say he detected the odor of whisky. The agents then discovered a small door in the side of the garage which was enclosed by the fence and which opened into petitioner's back yard. One agent entered the back yard by climbing over the fence. Going to the door which led into the garage he broke off the hasp and in this way entered the garage where one hundred twenty-two cases of white corn whisky were found. After the entry had been made and while the search was in progress, the petitioner appeared on the sidewalk, was arrested by two of the agents and taken into the garage which was being searched by other agents. After his arrest, Taylor was permitted to go into the house for his coat and the agent who went with him and other agents testified that the premises was used as the private home of petitioner. The agents had no search warrant for the garage and at no time had they endeavored to obtain a search warrant from the United States Commissioner.

As a result of this search and seizure an indictment was filed against petitioner charging violation of Title 2, Sections 3, 25 and 29 of the Act of October 28, 1919, known as the National Prohibition Act. A Motion to Suppress

the Evidence and Quash the Indictment was filed and overruled by the trial Court. A plea of "not guilty" was entered, a jury trial waived and the Court, sitting as a jury, found petitioner guilty as charged in the indictment and sentenced him to be imprisoned for three months in jail and to pay a fine of Seven Hundred Fifty ($750.00) Dollars and costs.

From this judgment the petitioner appealed to the Circuit Court of Appeals, upon which appeal the Circuit Court of Appeals rendered an opinin and made an Order affirming the judgment of the District Court.

The petitioner, before his trial, sought to suppress the evidence on the ground that the search and seizure were illegally made. This was the precise point raised in the Circuit Court of Appeals. The Circuit Court of Appeals, however, affirmed the judgment of the District Court on the ground that the garage was not connected with the dwelling house.

Specifications of Errors.

1. The Circuit Court of Appeals erred in its ruling that the garage was no part of the private dwelling.

2. The Circuit Court of Appeals erred in holding that the unlawful breaking, forcible entry and search of these premises at 2:30 at night without a search warrant *was not unreasonable* within the contemplation of the Fourth and Fifth Amendments to the Constitution of the United States.

3. The Circuit Court erred in ignoring the difference laid down by this Honorable Court between the *search of*

a permanent structure for which a proper warrant may be obtained and the *search of a moving vehicle.*

4. The Court erred in attempting to justify the forcible entry on the ground that an odor of whisky was evidence of a crime committed in the presence of the officers when in fact no one was in the garage and the officers knew no person was present and committing a crime.

5. The Circuit Court erred in admitting the evidence so obtained and the information gained as a result of such search and seizure, a seasonable objection having been interposed.

ARGUMENT.

I.

THE CIRCUIT COURT OF APPEALS ERRED IN ITS RULING THAT THE GARAGE WAS NO PART OF THE PRIVATE DWELLING.

The Circuit Court of Appeals erred in holding that petitioner's garage which was a part of his private dwelling is not entitled to the protection of Section 25, Title 2 of the National Prohibition Act and the Fourth Amendment to the Constitution of the United States.

Section 25, Title 2 of the National Prohibition Act (27 U. S. C. A., Sec. 39; 41 Stat. 315) provides that no search warrant shall issue to search any private dwelling occupied as such, with certain exceptions not material here.

Section 6 of the Act of November 23, 1921 (18 U. S. C. A., Sec. 53; 42 Stat. 222, 223) provides that any officer, agent or employee of the United States who shall search

any private dwelling, as defined in the National Prohibition Act, without a search warrant, shall be guilty of a misdemeanor.

The Fourth Amendment declares that the right of the people to be secure in their person, houses, papers, and effects against unreasonable searches and seizures shall not be violated.

In the trial Court, the Government admitted that the premises concerned was a private dwelling occupied as such by the petitioner (R. 16).

The effect of the opinion of the Circuit Court of Appeals is to place an unjustifiably narrow interpretation upon the term "private dwelling" as used in Section 25, Title 2, National Prohibition Act, and to limit the Fourth Amendment to the Constitution by such interpretation. Such an interpretation is in direct conflict with a prior decision of the Circuit Court of Appeals in Henderson v. United States, 12 F. (2) 528, 529, one of the cases cited in the opinion of the Circuit Court. The Court has attempted to divorce from the main house those buildings convenient and necessary to the occupancy of the premises described as "within the curtilage."

This is contrary to the ruling that a garage is part of a residence premises

Temperani v. United States, 299 Fed. 365.
Bare v. Commonwealth, 122 Va. 783.
Devoe v. Commonwealth, 3 Met. 316, 325.
United States v. Slusser, 270 Fed. 818.

which is supported by Hale, Blackstone, Greenleaf, Bishop and all the text-writers.

In the famous case of Bare v. Commonwealth, 122 Va. 783, the Supreme Court of Appeals of Virginia ruled that an outhouse was included in a dwelling and in defining the term "home" as used in the prohibition law of Virginia (the Map law, Acts 1916, p. 216), that Court gave an interesting and exhaustive review of authorities on the meaning of the term. Judge Prentis speaking for the Court, said:

> "We know of no analogy in the law for the construction of this langauge, except such as is found in the common and statute law referring to arson, burglary, and to homicide and assault cases, where the prisoner claims to have committed the alleged crime in self-defense after having retreated to his castle, or his home. As construed by the courts from the earliest to the latest times, the words 'dwelling' or 'dwelling house' have been construed to include not only the main house, but all of the cluster of buildings convenient for the occupants of the premises, generally described as 'within the curtilage.'
>
> "Sir Mathew Hale says: '*Domus mansionalis* doth not only include the dwelling house but also the outhouses that are parcel thereof* * * if they are parcel of the messuage, though they are not under the same roof, or joining contiguous to it. Hale's Pleas of the Crown (558).
>
> "Blackstone (4. Bl. m. p. 225) announces the same doctrine, saying that if the houses are within the common fence, though not under the same roof or contiguous, a burglary may be committed therein

for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or homestall.'

"In 3 Greenleaf (2d ed.) sec. 80, we find this succinct and comprehensive statement: The term "mansion," or "dwelling house," comprehends all the outbuildings which are parcel thereof, thought they be not contiguous to it. All buildings within the same curtilage or common fence, and used by the same family, are considered by the law as parcel of the mansion. If they are separated from the dwelling house, and are not within the same common fence, though occupied by the same owner, the question, whether they are parcel of the mansion or not, is a question for the jury upon the evidence.'

"Mr. Bishop says: 'A dwelling house need not be under one roof. It may be a cluster of separate buildings, and it includes the outhouses and buildings in the clouster, appurtenant and auxiliary, being parcel of the messuage and within the curtilage, and which are subservient to the main dwelling for the purpose of habitation.' 2 Bish. Cr. Law (7 ed.), sec. 104; State v. Wilson, 2 N. C. 242; Pitcher v. People, 16 Mich. 147.

"Pendleton, P., in Commonwealth v. Posey, 4 Call (8 Va.) 122, 2 Am. Dec. 560, says: 'Dwelling house is a complex term, and scarcely more certain than house; for it is not confined to any particular room in the building, nor even to the same roof, but it extends to all the houses belonging to the curtilage.'

"In Page v. Commonwealth, 26 Gratt. (67 Va. 947), Moncure P., says: 'An outhouse, adjoining a dwelling house, or under the same roof, or within the cur-

tilage thereof and occupied therewith, was considered, at common law, as part and parcel of the dwelling house, within the meaning of the law concerning arson and burglary.'

"In England the curtilage seems to have included only the buildings within the inner fence or yard, because there, in early times, for defense, the custom was to enclose such place with a substantial wall. In this country, however, such walls or fences, in many cases, do not exist, so that with us the curtilage includes the cluster of buildings constituting the habitation or dwelling place, whether enclosed with an inner fence or not.

"In Pond v. People, 8 Mich. 150, it was held in a case in which the prisoner was charged with murder, that a building thirty-six feet distant from the prisoner's house, used for preserving the nets employed in the owner's ordinary occupation as a fisherman, and also as a dormitory for his servants, is in law a part of his dwelling, though not included with the house by a fence, and that a fence is not necessary to include buildings within the curtilage if within a space no larger than that usually occupied for the purposes of the dwelling and customary outbuildings.

"It would seem that the special privileges pertaining to a man in his own habitation are available for his protection only while he is in such space as is usually occupied for the purposes of the dwelling and the customary out-buildings. Lee v. State, 92 Ala. 15, 9 So. 407, 25 Am. St. Rep. 17; People v. Taylor, 2 Mich. 250.

"The curtilage of a dwelling house is a space necessary and convenient, habitaually used for family

purposes and the carying on of domestic employment; the yard, garden or field which is near to and used in connection with the dwelling. 3 Cyc. 988; Washington v. State, 82 Ala. 31, 280, 356; Cook v. State, 83 Ala. 62, 3 So., 849, 3 Am. St. Rep. 688; State v. Shaw, 31 Me. 523; Commonwealth v. Barney, 10 Cush. (64 Mass.) 480; Unseld v. Commonwealth, 140 Ky. 529, 131 S. W. 263, 140 Am. St. Rep. 393.

"Coming to the case and statute under consideration, it seems evident from such analogy as well as in accord with common understanding and acceptation that the words 'home' and 'permanent residence' must be construed to mean the place of residence rather than any particular building which may be at that place. It is the home which is loved, the spot to which when absent we expect to return, and which is idealized in our favorite song; that place or castle, which no man may enter without the consent of the owner, and in defense of which, and of every part of which, the taking of human life has been frequently excused."

But, so far as Constitutional rights are concerned, it is of no consequence whether the place where the liquors were seized is characterized as a "private dwelling" or a "house" within the meaning of the Fourth Amendment. The protection of the Fourth Amendment includes garages, barns and other structures.

Temperani v. United States, supra.
United States v. Slusser, supra.

The search of a dwelling for intoxicating liquor without a warrant is strictly prohibited. And the issuance of a search warrant for such a premises is definitely limited.

National Prohibition Act, Sec. 25, Title 2, 27 U. S. C. A., Sec. 39;
Espionage Act of June 15, 1917, Title XI, 18 U. S. C. A., Sec. 611 et seq.;
Singleton v. United States, 290 Fed. 130;
Staker v. United States, 5 (F. (2) 312;
Lindsly v. United States, 12 F. (2) 771;
Thompson v. United State, 22 F. (2) 134;
Carroll v. United States, 267 U. S. 132;
United States v. Berkeness, 275 U. S. 149;
Agnello v. United States, 269 U. S. 20, 30;
United States v. Dean, 50 F. (2) 905, 906;
Schroeder v. United States, 14 F. (2) 500;
Alvau v. United States, 33 F. (2) 467, 470.

In Thompson v. United States, supra, previously decided, the Circuit Court of Appeals, speaking through Judge Soper, said:

> "It is well settled that the effect of the provisions of the Fourth Amendment to the Constitution of the United States, of Section 25 of title 2 of the National Prohibition Act (27 U. S. C. A., Sec. 39), and title 11 of the Espionage Act of June 15, 1917 (40 Stat. 288; 18 U. S. C. A., Sec. 611 et seq.), is to forbid the search of a private dwelling by a national prohibition agent without a search warrant, and to require that a search warrant shall not issue to search a private dwelling unless it is being used for the unlawful sale of intoxicating liquor."

In Staker v. United States, 5 F. (2) 312, 314, the Circuit Court of Appeals, Sixth Circuit, said:

> "The officers had no probable cause to believe from the smell alone that the dwelling house was being used for sales. *The situation did not justify a search*

without a warrant (Italics ours.) The policy of the Statute goes far to restrict the right of searching a dwelling even with a warrant. Such policy cannot be frittered away by granting a broader right of search without a warrant."

This Honorable Court in Agnello v. United States, supra, citing the Temperani case, condemned the search of dwellings without a warrant. Mr. Justice BUTLER said:

"While the question has never been directly decided by this Court, it has always been assumed that one's house cannot lawfully be searched without a search warrant except as an incident to a lawful arrest therein.

Boyd v. United States, 116 U. S. 616, 624 et seq. 630.
Weeks v. United States, 232 U. S. 383.
Silverthorne Lumber Co. v. United States, 251 U. S. 385.
Gouled v. United States, 255 U. S. 298, 308.

"The protection of the Fourth Amendment extends to all equally,—to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant. On the other hand, special limitations have been set about the obtaining of search warrants for that purpose. Thus, the National Prohibition Act, approved October 28, 1919, c. 85, Tit. 11, sec. 25, 41 Stat. 305, 315, provides that no search warrant shall issue to search any private dwelling occupied as such unless it is being used for

the unlawful sale of intoxicating liquor or is in part used for business purposes, such as store, shop, saloon, restaurant, hotel or boarding house.

"And later to the end that government employees without a warrant shall not invade the homes of the people and violate the privacies of life, Congress made it a criminal offense, punishable by heavy penalties, for any officer, agent or employee of the United States engaged in the enforcement of any law to search a private dwelling house without a warrant directing such a search.

Act of November 23, 1921, c. 134 sec. 6, 42, Stat. 222, 223.

"Safeguards similar to the Fourth Amendment are deemed necessary and have been provided in the Constitution and laws of every state of the Union. We think there is no State Statute authorizing the search of a house without a warrant; and, in a number of States laws recently enacted for the enforcement of prohibition in respect of intoxicating liquors, there are provisions similar to those in sec. 25 of the National Prohibition Act. Save in certain cases incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant.

"Absence of any judicial approval is persuasive authority that it is unlawful. See

Entick v. Carrington, 19 Howell's State Trials, 1030, 1066.

"Beliefs however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a war-

rant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause. See

Temperani v. United States, 299 Fed. 365.
United States v. Rembert, 284 Fed. 996, 1000.
Connelly v. United States, 275 Fed. 509.
McClurg v. Brenton, 123 Ia. 368, 372.
People v. Margolis, 200 Mich. 431.
Childers v. Commonwealth, 198 Ky. 848.
State v. Warfield, 184 Wis. 56.

"The search of Frank Agnello's house and seizure of the can of cocaine violated the Fourth Amendment."

II.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE UNLAWFUL BREAKING, FORCIBLE ENTRY AND SEARCH OF THESE PREMISES AT 2:30 AT NIGHT WITHOUT A SEARCH WARRANT WAS NOT UNREASONABLE WITHIN THE CONTEMPLATION OF THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The breaking into and search of any building at 2:30 o'clock at night is unreasonable and a wanton violation of the Fourth Amendment. The violation of the Constitution becomes even more grave when the building forcibly entered and searched was part of a dwelling and the occupant was aroused from his sleep.

In Alvau v. United States, 33 F. (2) 467, 470, the Circuit Court of Appeals for the Ninth Circuit, said:

"Forcibly and in the nighttime to enter an occupied residence, even though it is thought to be used in part for unlawful purposes, is likely to be attended

with disorder, and to result in violence and tragic consequences. We feel constrained to hold that the search was unreasonable and in violation of the Constitutional rights, and that therefore the evidence was inadmissible."

Speaking of this ancient grievance and recalling abuses resulting from the issuance of writs of assistance in England and the American Colonies, the Supreme Court of Michigan in People v. Marxhausen, 204 Mich. 559, 564 (1919), said:

> "The infraction of individual rights tolerated then as now under the claim of necessity in order to enforce the law finally came before the courts for decision. In the case of Entick v. Carrington, 19 Howell's State Trials, 1029, Lord Camden, pronouncing the judgment of the Court, laid broad and deep the principles which were afterwards crystallized in the Fourth Amendment."

The Court then recalled how James Otis of Massachusetts, Advocate-General of the Crown at Boston, resigned his office and acted as one of the counsel in resisting the arrests made under these warrants at a trial in Boston in 1761.

> "He spoke for five hours," the Court quotes, "and it is doubtful if any legal argument ever made on this continent produced a more profound or lasting impression. He set fire to *a torch which is still burning* (Italics ours), and which will continue to burn, for in that masterful effort he impressed upon the American heart the great lesson of resistance to tyranny and outrage. As the result of the trial the writs were never afterwards served by judicial sanction."

It is to be noted that the nighttime breaking and entry in the instant case were perpetrated without even the pretense of writ or warrant of any kind. Otis' words that these writs "placed the liberty of every man in the hands of every petty officer" apply with equal force to the acts of the prohibition agents in the case at bar.

The Supreme Court of Michigan continued:

> "These events which we have but given in outline occurred within the memory of the men who formulated and adopted the Fourth Amendment. In clear and unmistakable language these men wrote into the fundamental law of the nation to be afterwards incorporated into the fundamental law of the various States of the Union the safeguard against unlawful and unreasonable search and seizure of the person and property of the citizen, irrespective of whether such unlawful and unreasonable search and seizure had the sanction of legislative approval or rested in the arbitrary will of the executive and administrative arm of the State."

The search of petitioner's premises and the seizure of his property in the instant case offended the rights secured to him by the provisions of the fundamental law of the United States. These officers had no search warrant issued upon oath or affirmation, no warrant of any kind. They violated his privacy in the middle of the night by command of no court. They broke into and searched his premises by virtue of no process. Their acts were unreasonable and in violation of the statutes and the Constitution of the United States.

In the language of this Honorable Court in Weeks v. United States, 232 U. S. 383, 391, 392:

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

III.

THE CIRCUIT COURT ERRED IN IGNORING THE DIFFERENCE LAID DOWN BY THIS HONORABLE COURT BETWEEN THE SEARCH OF A PERMANENT STRUCTURE FOR WHICH A PROPER WARRANT MAY BE OBTAINED AND THE SEARCH OF A MOVING VEHICLE.

This phase of the case was not considered in the opinion of the Circuit Court in the instant case. There was a total disregard for the "necessary difference" between the search of a *permanent structure* and a *moving vehicle*

which was clearly and distinctly laid down by this Honorable Court in Carroll v. United States, 267 U. S. 132, and repeated in the *Agnello Case*. When the Government cited the Carroll Case in support of the search without a warrant of a permanent structure in the latter case, this Honorable Court said it did not support the Government's contention and repeated the language in the *Carroll Case* which points out the difference between the search of a building and a vehicle, and emphasized it as follows:

> "We have made a somewhat extended reference to these Statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structures in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

IV.

THE COURT ERRED IN ATTEMPTING TO JUSTIFY THE FORCIBLE ENTRY ON THE GROUND THAT AN ODOR OF WHISKY WAS EVIDENCE OF A CRIME COMMITTED IN THE PRESENCE OF THE OFFICERS WHEN IN FACT NO ONE WAS IN THE GARAGE AND THE OFFICERS KNEW NO PERSON WAS PRESENT AND COMMITTING A CRIME.

The forcible entry and search in this case does not come within the exception mentioned in the *Agnello Case* of a search "incident to a lawful arrest." No person was present and subject to arrest. There was no one in

the garage and the Government agents not only did not suspect that anyone was there, but they actually *knew* by peeping through the cracks between the doors before they forced their way in that no one was there. The search and seizure cannot be justified as an incident to a lawful arrest.

Temperani v. United States, 299 Fed. 365.
Henderson v. United States, 12 F. (2) 528.
Alvau v. United States, 33 F. (2) 467.
United States v. Dean, 50 F. (2) 905.
DePater v. United States, 34 F. (2) 275.

In Alvau v. United States, supra, prohibition agents, without a search warrant, went to the defendant's residence at 3:00 o'clock during the night. Some distance from the house they detected an odor of fermenting mash which grew stronger as they approached. They investigated the barn and found in the yard a surface cesspool which was warm and from which arose the odor of fermenting mash. When they received no response to their demands for admission to the house they broke open a basement door and the search finally resulted in the discovery of a secret door in the wall of the basement which led to underground chambers where a distilling operation was discovered.

In condemning this search and seizure the Court said that the forcible entry of the house was not justified, especially since the circumstances within the knowledge of the officers were barely sufficient even in the most favorable view to authorize a magistrate to issue a search warrant.

The Court declared:

> "There was here no emergency; it is not a case of a rapidly moving automobile or other instrumentality employed in violation of the law, or of an outcry from a closed building of murder, or robbery, where immediate action is often necessary. If the information obtained by the government through the sense of smell was sufficient to authorize the issuance of a search warrant, there was no reason why the officers should not have made application therefor, and thus have proceeded in an orderly manner."

Following the rulings of this Honorable Court, evidence was suppressed by reason of an illegal search and seizure in a case parallelling the one at bar with the exception that the defendant in that case was present and refused the agents permission to enter his garage before they began their search. In allowing the Motion to Suppress the Evidence, the Court in United States v. Dean, supra, said:

> "The search was clearly illegal. Officers have no right to enter private buildings without legal justification. Where officers have knowledge that a person in the building is in the act of committing a felony, or possibly a misdemeanor, they may enter without a warrant in order to arrest him and suppress the crime, and they may enter to arrest a person against whom a warrant is out or who is reasonably suspected of having committed a felony. I am aware of no other cases in which officers are justified in forcing an entrance without a warrant into private property. These principles have been so often stated that a citation of authorities is perhaps unnecessary, but the following may be referred to: Amos v. U. S.,

255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654; Raniele v. U. S., 34 F. (2d) 877 (C. C. A. 8); Temperani v. U. S., 299 F. 365 (C. C. A. 9); U. S. v. Di Corvo (D. C.) 37 F. (2d) 124 (discussing cases); Russell v. State, 37 Okl. Cr. 71, 256 P. 758."

The Circuit Court of Appeals ruled in the instant case, that the search was justified by the commission of an offense in the presence of the officers (R. 34). But no offender was in the presence of the officers. This ruling is in conflict with the decision in Temperani v. United States, supra, which has been cited with approval by this Honorable Court (Agnello v. United States, 269 U. S. 20), in which it was said at page 367:

"The government, as we understand it, does not claim the right to search a private dwelling or garage under the facts disclosed by this record, but an attempt is made to justify the conduct of the officers under the common-law or statutory rule permitting peace officers to make arrests for offenses committed within their presence. But here the offender was not in the presence of the officers; he was not in the garage, and they had not reason to suspect that he was there. Laying all pretense aside, the officers entered the garage, not to apprehend an offender for committing an offense within their presence, but to make a search of the premises to obtain tangible evidence to go before a jury, and whatever necessity may exist for enforcing the National Prohibition Act (Comp. St. Ann. Supp. 1923, sec. 10138¼ et seq.), or other laws, the violation of rights guaranteed by the Constitution cannot be tolerated or condoned. If present laws are deficient in not permitting the search, in a constitutional way, of homes where in-

toxicating liquor is known to be manufactured, the remedy is with Congress, not in subterfuge or evasion. For these reasons, the court should have kept from the jury all property found on the search and all evidence given by the officers concerning the same. Amos v. United States, 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654."

Circuit Judge Mack, speaking for the Circuit Court of Appeals for the Sixth Circuit, expounds and condemns this justification theory in Staker v. United States, supra, and, at page 314, says:

"The government attempts to justify the search on the ground that peace officers have the right to arrest and search a person committing a criminal offense in their presence. Leaving aside the question whether prohibition agents are peace officers (see Brady v. U. S., 300 F. 540 (C. C. A. 6); Agnello v. U. S., 290 F. 671 (C. C. A. 2), the offender was not in the presence of the officers, and there is no evidence that they had reason to suspect that he was. (Temperani v. U. S., 299 Fd. 65 (C. C. A. 9). Moreover, it may be questioned whether, in cases of misdemeanor, a peace officer or a private person has any power of arresting without a warrant except when a breach of peace has been committed in his presence, or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence. Wilgus, Arrest Without Warrant, 22 Mich. Law Rev. 541, 673, 798, especially 703-709. There is no evidence here of any breach of peace, existing or imminent, which would justify the exercise of powers sanctioned by the common law only in situations of emergency. See Carroll v. U. S., supra. In Agnello v. U. S., supra, McBride v. U. S. C. C.

A.) 284 F. 416 (C. C. A. 5), and Garske v U. S. (C. C. A.) 1 Fed. 620, the search was justified as incidental to a lawful arrest."

In some instances the common law may be relied upon to supply incidents of the powers of police officers, but in modern times their duties and powers are almost entirely defined and regulated by statute. The common law powers of peace officers have been limited by Constitutional provisions and largely replaced by statutes and regulations. But prohibition agents were officers unknown to the common law. They are civil officers of the United States (Dumbra v. United States, 268 U. S. 435) who are creatures of statutory law and no statute confers upon prohibition agents the *general* powers of peace officers. Furthermore, the common law could not be invoked since the National Prohibition Act itself is clear and definite as to the procedure to be followed by prohibition agents in its enforcement. Their conduct in the instant case cannot be justified by the common law when it was prohibited in particular by the National Prohibition Act, and in general by the Fourth Amendment to the Constitution.

Nowhere in the statutes can justification for the procedure of the prohibition agents in the instant case be found. And justification is incumbent upon the Government. Concerning such justification, Mr. Justice Bradley in Boyd v. United States, supra, cited Entick v. Carrington, supra, and characterized it as follows:

"The case, however, which will always be celebrated as being the occasion of Lord Camden's memorable discussion of the subject, was that of *Entick v.*

Carrington and Three Other King's Messengers, reported at length in 19 Howell's State Trials, 1029. After describing the power claimed by the Secretary of State for issuing general search warrants and the manner in which they were executed, Lord Camden says: 'Such is the power, and therefore, one would naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books; if it is not to be found there, it is not law.

" 'The great end for which men entered into society was to secure their property. That right is reserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, etc., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action though the damages be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority, against the defen-

dant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.'"

Further commenting on Lord Camden's decision in the same case, Mr. Justice BRADLEY said:

"The law as expounded by him has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time."

That the end justifies the means is "a doctrine which has not found lodgment in the archives of this Court," is as true of this Honorable Court as it is of the Supreme Court of Michigan which applied the phrase to itself in People v. Marxhausen, 204 Michigan 559, 564 (1919), wherein the search of a residence premises was condemned on the authority of Boyd v. United States, supra, and Weeks v. United States, supra, and the following language used:

"The search and seizure detailed in this record was an unauthorized trespass and an invasion of the Constitutional rights of this defendant.

"These rights of the individual in his person and property should be held sacred, and any attempt to fritter them away under the guise of enforcing dras-

tic sumptuary legislation (no matter how beneficial to the people it may be claimed to be), must meet with the clear and earnest disapproval of the courts."

The Court in the above case gave effect to the conclusion of Mr. Justice DAY in the *Weeks Case* that if the judgments of the Courts, which are charged at all times with the support of the Constitution, are to sanction the tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures destructive of the rights secured by the Federal Constitution, the protection of the Fourth Amendment is of no value and might as well be stricken from the Constitution.

V.

THE CIRCUIT COURT ERRED IN ADMITTING THE EVIDENCE SO OBTAINED AND THE INFORMATION GAINED AS A RESULT OF SUCH SEARCH AND SEIZURE, A SEASONABLE OBJECTION HAVING BEEN INTERPOSED.

A seasonable objection was made to the use of evidence resulting from this search on the ground that it was obtained by an illegal search and seizure and for that reason violated section 25, title 2, National Prohibition Act and the Fourth and Fifth Amendments to the Constitution of the United States. In accordance with prior rulings of the Circuit Court of Appeals for the Fourth Circuit and of this Honorable Court the evidence offered in this case was not admissible against the petitioner.

Mahoney v. United States, (C. C. A. 4th) 26 F. (2) 902.

Snyder v. United States, (C. C. A. 4th) 285 Fed. 1.

Byars v. United States, 273 U. S. 28.

In Snyder v. United States, supra, Judge Groner, speaking for the Circuit Court of Appeals for the Fourth Circuit, said:

> "In the Federal Courts evidence obtained from defendant by an unlawful search is inadmissible against him.
>
> Boyd v. United States, 116 U. S. 616;
> Weeks v. United States, 232 U. S. 383;
> Silverthorne Lbr. Co. v. United States, 251 U. S. 385;
> Gouled v. United States, 255 U. S. 398;
> Amos v. United States, 255 U. S. 313."

In Byars v. United States, 273 U. S. 28, the defendant was convicted of the possession of strip stamps which were admitted in evidence over his objection that they had been obtained by an unlawful search and seizure. A timely motion made by the defendant was overruled by the trial Court. In reversing the Circuit Court of Appeals which affirmed the judgment of the trial Court, Mr. Justice SUTHERLAND said:

> "Nor is it material that the search was successful in revealing evidence of a violation of a Federal statute. A search prosecuted in violation of the Constitution is not made lawful by what is brought to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our Constitutional system that evidence of crime discovered by a Federal officer in making a search without a lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed."

CONCLUSION.

It is respectfully submitted that the search of petitioner's garage, which was a part of his residence, at 2:30 o'clock during the night and in which no person was present committing a crime was unreasonable, unlawful, illegal, unauthorized and in violation of the Fourth and Fifth Amendments to the Constitution of the United States, contrary to Section 25, Title 2 of the National Prohibition Act, and to Section 6 of an Act Supplemental to the National Prohibition Act, approved November 23, 1921, and that the Circuit Court of Appeals for the Fourth Circuit erred in upholding such a search when a timely challenge to the evidence and information gained as a result of the search was interposed, and that the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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Of Counsel.

APPENDIX.

STATUTES INVOLVED.

The Fourth Amendment to the Constitution of the United States, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution of the United States, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 25, Title II, of the National Prohibition Act, c. 85; 27 U. S. C. A., Sec. 39; 41 Stat. 315, provides:

> It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor

intended for use in violating this title, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process.

Section 6 of the Act of November 23, 1921, c. 134; 18 U. S. C. A., Sec. 53; 42 Stat. 222, 223, provides:

That any officer, agent or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing

such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than $1,000, and for a subsequent offense not more than $1,000 or imprisoned not more than one year, or both such fine and imprisonment.

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No. 695

In the Supreme Court of the United States

OCTOBER TERM, 1951

JOHN VANCE TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court's opinion on the motion to suppress the evidence and to quash the indictment appears at R. 16–19. The opinion of the Circuit Court of Appeals (R. 32–36) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 13, 1932. (R. 37.) The petition for certiorari was filed February 11, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The only question presented is whether the trial court erred in refusing to exclude evidence procured through a search of petitioner's garage without a search warrant. We submit that this Court is not in a position to review this question as, so far as the record shows, the bill of exceptions containing the evidence was filed out of time.

STATEMENT

Petitioner was indicted in the United States District Court for the District of Maryland for the possession of 122 cases (732 gallons) of whiskey in violation of the National Prohibition Act, the indictment charging two prior convictions of the offense of possession. (R. 1–3.)

While the chronology of subsequent events is not very clear, it appears that immediately prior to trial, petitioner filed a motion to suppress the evidence and to quash the indictment on the ground that the search and seizure on which the evidence and indictment were based were illegal. (R. 4–5.) A hearing was had on the motion, at which time evidence was introduced by the Government. No evidence was offered by petitioner. At the close of the Government's evidence, the petitioner renewed his motion to exclude the evidence. (R. 9–16.) The motion was overruled, an oral opinion being rendered, and an exception was noted by petitioner. (R. 16–19.)

Following a trial to the court without a jury, petitioner was found guilty as charged in the indictment, and sentenced to three months' imprisonment in jail and to pay a fine of $750. (R. 7.) On appeal to the Circuit Court of Appeals the judgment was affirmed. (R. 36–37.)

ARGUMENT

The question presented is one which depends peculiarly upon a consideration of the evidence. As we contend that the evidence is not properly before this Court because, so far as the record shows, the bill of exceptions containing the evidence was allowed and filed out of time and that it is, therefore, unnecessary for this Court to consider the question urged, we will discuss only the timeliness of the bill of exceptions.

In a "memorandum" appearing in the Record (R. 7) it is stated that the "Verdict was rendered in this case on the 12th day of February, 1931, and Judgment was rendered on the same day." Other portions of the record indicate that the correct date of the verdict and judgment was February 19, 1931. See, for example, "Motion to suppress evidence and quash indictment and order of court overruling same" (R. 4) and "Agreement of parties waiving trial by jury" (R. 7), all of which were filed on February 19, 1931. The record also shows that the petition for appeal and order granting the appeal were dated or filed February 19, 1931 (R. 28), and it likewise appears that petitioner was admitted to

bail on that date pending his appeal to the Circuit Court of Appeals (R. 8). Taking the date most favorable to the petitioner, we will, therefore, assume that the verdict and judgment were entered on February 19, 1931. Section 86 of the Judicial Code, as amended by the Act of March 3, 1925, c. 422, 43 Stat. 1106 (U. S. C., Title 28, Sec. 166), provides that terms of the District Court for Maryland shall be held at Baltimore on the first Tuesdays in March, June, September, and December. The petitioner was indicted and tried in Baltimore (R. 1). The verdict and judgment were therefore rendered during the December term of the District Court which, under Section 86, Judicial Code, expired at the commencement of the March term on March 3, 1931. But it is provided in Rule 39 of the Rules of the District Court for Maryland that—

> Bills of Exceptions may be signed in any cause at any time within thirty days from the rendition of the verdict of the jury or the findings of the court upon the issues of fact in said cause, but not thereafter, unless the time for signing said Bills of Exception shall have been previously extended by order of court or by written consent of parties.

If this rule had the effect of extending the term at which the verdict was rendered, it extended it until thirty days from February 19, 1931, or until March 21, 1931. (*Glickstein* v. *United States*, 215 Fed. 90 (C. C. A. 2d), but see *Jennings* v. *Phil., Balt. & Wash. Ry Co.*, 218 U. S. 255, 256.) On March 19,

1931, the District Judge entered an order extending the time for the filing of the bill of exceptions for a period of thirty days from the date thereof. (R. 8.) A day before this thirty-day period expired, or on April 17, 1931, the District Judge made another similar order. This order bears the notation that it was filed on April 17, 1931, and is headed "Order of court extending time for filing bill of exceptions to 17th May, 1931." (R. 9.) The thirtieth day, as stated in this heading, expired May 17, 1931, but the bill of exceptions was not signed or filed until May 18, 1931. (R. 9, 19.) In *Exporters* v. *Butterworth-Judson Co.*, 258 U. S. 365, 368, this Court said:

> In the recent case of *O'Connell* v. *United States*, 253 U. S. 142, 146, we reaffirmed the doctrine announced in *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293, 298—
>
> "By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term had expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error

> has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end."

The bill of exceptions in the instant case was, therefore, clearly out of time unless some of the exceptions announced by this Court are applicable. We do not believe that the instant case falls within any of those exceptions.

It is true that following the bill of exceptions there is a notation, in the usual form, "This Bill of Exceptions is agreed upon," and that this notation was signed by the United States Attorney and his assistant. This notation obviously constitutes nothing more than a statement by the United States Attorney that the bill satisfied him as to form and substance. But even if it were susceptible of the construction that it constituted a consent to the filing of the bill subsequent to the extended period, it must, to have validity, appear that it was given prior to the expiration of such period, for, otherwise, jurisdiction over the cause has been lost. *Waldron* v. *Waldron,* 156 U. S. 361; *Exporters* v. *Butterworth-Judson Co., supra.* The record does not show that it was given prior to the expiration of the extended period. Indeed, if the date mark "5/18/31" applies to it, as appears likely, the record shows affirmatively that it was given after such period.

The record is barren of anything which would indicate that the United States Attorney through any act or omission of his induced or misled petitioner into presenting or filing the bill out of time. He was not bound to keep petitioner informed in the matter, and his mere silence, clearly can not be construed as an estoppel. See *Jennings* v. *Phil., Balt. & Wash. Ry. Co.,* 218 U. S. 255, 258, *supra.*

Likewise, there is nothing in the record to indicate that the bill was presented during the extended period but not signed or filed until afterwards because of some "extraordinary circumstance."

In a matter such as this, involving the jurisdiction of a Federal court to do a particular act, the burden is, of course, upon the one seeking to support its jurisdiction. In the instant case the record presented is devoid of the necessary jurisdictional facts.

The last day of the extended period expired on Sunday, May 17, 1931. The bill was not signed or filed until Monday May 18, 1931. The fact that the period expired on a Sunday did not, we submit, operate to permit the signing and filing of the bill on the following day. As was stated in *Maresca* v. *United States,* 277 Fed. 727, 733 (C. C. A. 2d), in which this Court denied certiorari (257 U. S. 657):

> We see no reason why the rule this court applied in determining the time within which an appeal or a writ of error can be sued out should not be also applied in determining the time within which the bill of

exceptions can be signed and filed. The right to the bill of exceptions, in a criminal case in the federal courts, like the right to a writ of error, comes from the statute, and not from any rule of the court, and we know of no reason why it is not governed by the same principles in ascertaining the time within which it is to be signed. If, when the last day falls on Sunday or on a legal holiday, the appeal or writ of error can not be filed on the next day under the like circumstances, the bill of exceptions can not be signed or filed on the next day. It must follow that, whether the court below extended the term, as the government contends, to November 1st, or whether it extended it four months and to November 2d, which fell on a legal holiday, in either event the subsequent extension of the term not made until the following day came too late, and the bill of exceptions thereafter signed must be disregarded. *Blisse* v. *United States* (C. C. A.) 263 Fed. 961; *Anderson* v. *United States* (C. C. A.) 269 Fed. 65.

This case has the support of numerous other decisions involving situations similar in character. See also *Gotham Can Co.* v. *United States,* 281 U. S. 706; *Northwestern Public Service Co.* v. *Pfeiffer,* 36 F. (2d) 5 (C. C. A. 8th); *Huntt* v. *Brightwood Sanitorium Co.,* 288 Fed. 272 (App. D. C.); *Covey* v. *Williamson,* 286 Fed. 459 (App. D. C.); *Siegelschiffer* v. *Penn Mutual Life Ins. Co.,* 248 Fed. 226 (C. C. A. 2d), 246 U. S. 654; *Meyer* v. *Hot Springs*

Imp. Co., 169 Fed. 628 (C. C. A. 9th); *Johnson* v. *Meyers*, 54 Fed. 417 (C. C. A. 8th). See also *In re Antonen*, 293 Fed. 473 (D. Ore.); *Hermann* v. *United States*, 66 Fed. 721 (S. D. N. Y.); *Shefer* v. *Magone*, 47 Fed. 872 (S. D. N. Y.).

CONCLUSION

For the reasons stated above, we submit that the petition should be denied.

Respectfully submitted.

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G. A. YOUNGQUIST,
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MARCH, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

FILE COPY

No. 598

In the Supreme Court of the United States

OCTOBER TERM, 1931

JOHN VANCE PAYLOR, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 693

JOHN VANCE TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In response to the petition for certiorari, the Government filed a brief in opposition which pointed out that the record disclosed that the bill of exceptions was filed out of time and that therefore the points urged by petitioner could not be reviewed. To this brief petitioner filed a reply in which he prints and relies upon an affidavit signed by the Assistant United States Attorney who represented the Government at the trial of the case. We do not dispute the accuracy of the facts set forth in the affidavit, but merely point out that it is not part of the record.

If this Court should be of opinion that it may nevertheless consider the questions urged by petitioner, we are compelled to say that, irrespective of the question whether the garage searched may be considered as a part of petitioner's private dwell-

ing within the meaning of Section 25, Title II, of the National Prohibition Act, we do not believe that under the facts shown by the record the agents were legally justified in searching this garage without a warrant.

If it be assumed that there was probable cause justifying the issuance of a search warrant, the record in this case discloses no adequate reason or necessity for failure to apply for a warrant before forcibly entering the premises. A motion was made, and denied, to suppress the evidence procured in the search. This motion was renewed, and again denied, upon the trial. Conviction followed, predicated solely upon such evidence.

We believe the search was unreasonable, and the defendant's conviction unwarranted, but do not formally confess error because we feel that where a conviction of a criminal offense has been affirmed in a Circuit Court of Appeals judgment of conviction should not be reversed except by this Court, after examination of the record. Accordingly we submit the case for decision.

Respectfully submitted.

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APRIL, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

SUPREME COURT OF THE UNITED STATES.

No. 693.—October Term, 1931.

John Vance Taylor, Petitioner, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[May 2, 1932.]

Mr. Justice McReynolds delivered the opinion of the Court.

An indictment, United States District Court for Maryland, charged petitioner Taylor with the unlawful possession of intoxicating liquor—whiskey, one hundred twenty-two cases.

By timely petition to the court he asserted that in the night time prohibition agents acting without warrant had entered and searched the garage adjacent to his residence and had found and seized the liquor; that with this as evidence the indictment had been obtained; he anticipated that like use would be made of it at the trial. The prayer for its exclusion was denied.

By stipulation the cause went for trial by the court without a jury. The District Attorney called three of the agents who participated in the search. The defendant moved to exclude all their testimony on the ground that the search and seizure, made without warrant and in violation of his constitutional rights, were unreasonable; also that his private dwelling had been entered contrary to the inhibition of the Willis-Campbell Act. The trial court overruled this motion, adjudged defendant guilty and imposed fine and imprisonment. The Circuit Court of Appeals affirmed the judgment. The cause comes up by certiorari.

There is a suggestion, first made here, that the bill of exceptions printed in the record was signed by the judge out of time and therefore cannot be considered.

The trial took place during February, 1931. By proper orders permission to file the bill of exceptions was extended to May 17th, 1931—Sunday. It was actually signed on May 18th. Imme-

diately following the signature of the judge the following appears—"5/18/31. This Bill of Exceptions is agreed upon. Simon E. Sobeloff, U. S. Attorney. James M. Hoffa, Assistant U. S. Attorney."

The facts surrounding the preparation and signing have been presented by affidavit and are not in dispute. Having prepared the bill, petitioner's counsel duly lodged it with the United States Attorney. For convenience of the latter's office there were extensions of time to May 17th. On May 16th, the Assistant District Attorney having just completed examination of the bill, went with petitioner's counsel to the judge's chambers to secure his signature. Failing to find him, they agreed to ask his signature on Monday, May 18th. On that day, with the express approval of all parties and in pursuance of the earlier agreement, the judge signed the bill. The considerable delay in settling the bill followed the request of the Assistant District Attorney in charge and was permitted for his convenience.

In these exceptional circumstances—the facts being undisputed—we think the petitioner is entitled to the benefit of the bill. And negativing any intent to relax the general rule, we accept it as adequate and properly incorporated in the record. See *Waldron* v. *Waldron,* 156 U. S. 361, 378.

Without undertaking to defend the challenged search and seizure the Solicitor General submits the cause for our decision. As the conviction was affirmed by the Circuit Court of Appeals, he prefers not to enter a confession of error. He does, however, say that in his opinion, without regard to whether the garage constituted part of the private dwelling, upon the facts shown, the entry by the agents was wrongful and the search and seizure unreasonable. With this view we agree. The judgment below must be reversed.

During the night, November 19th, 1930, a squad (six or more) of prohibition agents while returning to Baltimore City discussed premises 5100 Curtis Avenue, of which there had been complaints "over a period of about a year." Having decided to investigate they went at once to the garage at that address, arriving there about 2:30 A. M. The garage—a small metal building—is on the corner of a city lot and adjacent to the dwelling in which petitioner Taylor resided. The two houses are parts of the same premises.

As the agents approached the garage they got the odor of whiskey coming from within. Aided by a searchlight they looked through a small opening and saw many card-board cases which they thought probably contained jars of liquor. Thereupon they broke the fastening upon a door, entered and found one hundred twenty-two cases of whiskey. No one was within the place and there was no reason to think otherwise. While the search progressed Taylor came from his house and was put under arrest. The search and seizure were undertaken with the hope of securing evidence upon which to indict and convict him.

Although over a considerable period numerous complaints concerning the use of these premises had been received, the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity so to do and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility.

We think, in any view, the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed. See *Carroll* v. *United States,* 267 U. S. 132; *United States* v. *Lefkowitz and Paris,* decided April 11, 1932, and cases there cited.

Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable search. This record does not make it necessary for us to discuss the rule in respect of searches in connection with an arrest. No offender was in the garage; the action of the agents had no immediate connection with an arrest. The purpose was to secure evidence to support some future arrest.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.